LAW AND PEACE IN INTERNATIONAL RELATIONS

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IN INTERNATIONAL RELATIONS

The Oliver Wendell Holmes Lectures, 1940–41

BY

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THE OLIVER WENDELL HOLMES LECTURES

THE late Justice Oliver Wendell Holmes left a legacy in his will for the Harvard Law School. By a vote of the President and Fellows of Harvard College, the income from this bequest is to be "devoted to paying the honorarium of a lecturer to be known as the Holmes Lecturer, and the expenses of publication of his lectures; this lecturer to be appointed for a series of lectures not oftener than once in three years by the Corporation upon recommendation of the Faculty of the Law School."

PREFACE

THIS book comprises the lectures that I gave at the Harvard Law School, in March, 1941, as Oliver Wendell Holmes Lecturer.

I wish to express my sincere gratitude to the Harvard Law School for the honor it has done me by associating me in these lectures with the memory of one of the greatest authorities in American Law and Jurisprudence.

I should like also to thank Miss Eleanor W. Allen for her valuable help in preparing the English text of my lectures.

H. K.

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LAW AND PEACE IN INTERNATIONAL RELATIONS

INTRODUCTION

LAW is, essentially, an order for the promotion of peace. Its purpose is to assure the peaceful living together of a group of individuals in such a way that they may settle their inevitable conflicts in a peaceful manner; that is, without the use of force, in conformity with an order valid for all. This order is the law.

Is international law also such an order? And if not, what is the way to make of international law a workable order for the promotion of peace? Or, to formulate the problem in a more modest and more realistic fashion, how can an international community embracing the greatest possible number of states be organized within the limits of international law, and in accordance with the specific technique of this law, to form a community really fostering peace?

These questions are the subject of the present lectures. They are two problems methodologically very different; one is theoretical and the other political. The aim of the first is to understand the nature and analyze the structure of the actually prevailing system of norms called international law. The aim of the second is to shape a legal reality which from a certain point of view — that of the ideal of peace — is regarded as an improvement upon the

present state. The second is the problem of a reform of international relations — one of the most burning problems of the times, upon whose solution the fate of civilization depends.

LECTURE I

THE CONCEPT OF LAW

WHAT is the nature of international law? Or, in other words, are the rules called international law to be regarded as "law" in the same sense as those norms that are considered "law" *par excellence*, the rules of national law? The answer to this question depends upon how one defines the concept of law.

1. DEFINING THE CONCEPT OF LAW

If the concept of law is to be defined not from a political but from a scientific point of view — that is to say, if no subjective judgment of value in regard to the shaping of social relations is to play a role consciously or unconsciously — the phenomenon generally called "law" must be regarded as a social phenomenon among other social phenomena. Any attempt to define a concept must proceed from the usual meaning of the word by which it is intended to designate the concept. One must see whether the social phenomena called "law" present a characteristic in common distinguishing them from other social phenomena, a characteristic sufficiently significant to constitute a general concept for the rational understanding of social life. In so doing, for reasons of economy of thought, one must proceed from the most comprehensive meaning

of the word "law." This is not to say that one might not set up a narrower concept of law, such that certain phenomena generally called law would not be included, but a concept whose extent coincides by and large with the common usage is to be preferred.

An example may illustrate what has been said. There is nothing to prevent defining the concept of law in such a way that a social order is recognized as law only if it guarantees to the individuals whose relations it regulates a certain minimum of personal freedom and the possibility of possessing private property; the social orders of Russia, Germany, and Italy, in general parlance called the "law" of these states, would not be regarded as law in the sense of this definition, although they have very significant elements in common with the social orders of democratic-capitalistic states likewise called "law" in common usage. This example also shows how political ideals can influence the definition of law. The guaranty of personal liberty and the institution of private property are elements of democracy and liberalism. From the standpoint of scientific consideration, however, free from any moral or political judgment of value, liberalism and democracy are merely two possible principles of social organization, as are socialism and autocracy. From the point of view of social science, it is impossible to prefer democracy and liberalism to autocracy and socialism, or *vice versa*. The basis of such a preference would be a moral or political judgment of value, which has no scientific character. There is, therefore, no scientific reason for limiting the

concept of law to a social order which corresponds to the political ideal of democracy and liberalism, or for excluding from the concept of law any social order which has an autocratic or socialistic character.

The guaranty of personal liberty and the institution of private property are not in themselves essential elements of law. The criterion by which law can be distinguished from any other social order has nothing to do with the difference between democracy or liberalism on the one hand and autocracy or socialism on the other. There are democratic and liberal legal systems just as there are autocratic and socialistic legal systems. But wherever and whenever they may exist or have existed, all these legal systems exhibit a common characteristic by which they can be distinguished from every other social order. This common characteristic is the only element by which it is possible to differentiate definitely and successfully between a legal and a moral or religious order. This element constitutes a fact of fundamental importance for the rational understanding of social life; it is suited in all respects to form the decisive criterion for an investigation into the nature of law. What is this criterion?

2. VOLUNTARY OBEDIENCE AND COERCION

The function of every social order — and society is nothing but an ordering of the reciprocal relations of individuals — is to bring about certain reciprocal behavior among individuals, to induce them to refrain from certain acts which for one reason or another are deemed detri-

mental to society and to perform others which for one reason or another are regarded as useful to society. The attainment of this goal may be sought in two fundamentally different ways — with or without the use of force. He who wishes to induce another to a certain conduct can do so by requesting, in the hope that the other, from respect or love, will fulfill his wish. He can instruct the other as to the appropriateness of the conduct demanded, in the expectation that the understanding thus acquired will supply the motive for corresponding action or abstention from action. He can also set an example, which is perhaps the most effective means of achieving voluntary obedience. This is the method of request, instruction, and example. The teacher and the saint are typical exponents of this social method.

There is, however, another and entirely different method of bringing about certain human behavior. In order to induce individuals to a certain conduct an authority can threaten them with an evil to be applied to them in case they behave differently. The threatened evil consists in depriving them of certain possessions, such as life, health, freedom, or property. This deprivation is to be carried out even against the will of the individual in question, by the use of force if necessary. It is taken for granted that the individuals whose conduct is being regulated will, in order to avoid the threatened evil, refrain from the undesired actions and perform the desired ones. The threatened evil is called a sanction. It is a measure of coercion, for it is carried out against the will of those subject to the order, by the

employment of force if necessary. The use of force ensues only if the application of the sanction meets with resistance, which is only exceptionally the case where the authority effecting the sanction has sufficient power. A social order that attempts to bring about the desired conduct of individuals by the enactment of sanctions is called a coercive order in the sense that it provides measures of coercion as sanctions. As such, it stands in the sharpest contrast to all the other social orders, which rest on voluntary obedience. Thus the contrast fundamental to social life — that of freedom and coercion — supplies the decisive criterion of this sort of order. It is the criterion of "law," for the law is such a coercive order.

3. THE LAW AS A COERCIVE ORDER

If all the social orders that have prevailed at different times and among different peoples are designated as legal orders the concept might seem almost devoid of meaning. What could the so-called law of the ancient Babylonians have in common with the law which prevails today in the United States, or the social order of a negro tribe under the authority of a despotic chief with the constitution of the Swiss Republic? Yet there is a common element that completely justifies this terminology, that enables the word "law" to appear as the expression of a concept with a meaning of great social significance. For the word denotes just that specific social technique of a coercive order which, despite the vast differences that exist between the law of ancient Babylon and that of the United States of

today, between the law of the Ashantis in West Africa and that of the Swiss in Europe, is yet essentially the same for all these peoples differing so widely in time, in place, and in culture: the social technique which consists in bringing about the desired social conduct of men through the threat of a measure of coercion which is to be executed in case of contrary conduct.

Originally there was only one sort of sanction — criminal sanction; that is, punishment — punishment involving life, health, freedom, or property. The most ancient law was criminal law. Later a differentiation was made in the sanction; there appeared, in addition to punishment, a special civil sanction known as civil execution — a forcible deprivation of property with the purpose of reparation or compensation for illegally caused damage. Thus there developed civil law in addition to criminal law. But the civil law, the law regulating the economic relations of individuals, guarantees desired conduct in its field in a manner not essentialy different from that in which the criminal law accomplishes the same thing in its domain, namely, by establishing in case of contrary conduct a coercive measure, its own specific coercive measure, civil execution. The civil sanction is distinguishable from the criminal sanction, and especially from the penalty involving property, not so much by outward circumstances as by its purpose; the purpose of the criminal sanction is prevention; of the civil sanction, reparation. But this contrast, too, is only relative. The social technique is fundamentally the same.

What the social conditions are that necessitate this technique is an important sociological question. I do not know whether we can answer it satisfactorily. Neither do I know whether it is possible for mankind to emancipate itself totally from this social technique. But if the social order should in the future no longer have the character of a coercive order, if society should exist without "law," then the difference between this society of the future and that of the present day would be immeasurably greater than the difference between the United States and ancient Babylon, or Switzerland and the Ashanti tribe.

4. LAW; MORALITY; RELIGION

While recognizing law as the specific social technique of a coercive order, we can contrast it sharply with other social orders which pursue in part the same purposes as the law but by quite different methods. And law is a means, a specific social means, not an end. Law, morality, and religion — all three — forbid murder. But the law does this by providing that if an individual commits murder, then another individual, designated by the legal order, shall apply against the murderer a certain measure of coercion prescribed by the legal order. Morality, on the other hand, limits itself to requiring: thou shalt not kill. And if a murderer is morally ostracized by his fellow men — many a man refrains from murder not so much because he wants to avoid the punishment of the law as to escape the moral disapprobation of his fellows — the great distinction still remains, that the reaction of the law

consists in a measure of coercion provided by the order and socially organized, whereas the moral reaction against immoral conduct is neither provided by the moral order nor, if provided, socially organized.

In this respect religious norms are nearer to legal norms than moral norms are. For religious norms threaten the murderer with punishment by a superhuman authority. But the sanctions which the religious norms lay down have a transcendental character; they are not socially organized sanctions, even though provided by the religious order. They are probably more effective than the legal sanctions, but their efficacy presupposes belief in the existence and power of a superhuman authority.

It is not the effectiveness of the sanctions, however, that is here in question, but only whether and how they are provided by the social order. A socially organized sanction is an act of coercion directed by an individual determined by the order, in a manner determined by the order, against an individual responsible for conduct contrary to the order. This conduct is called "delict." Both the delict and the sanction are determined by the legal order. The sanction is the reaction of the order against the delict, or, what amounts to the same thing, the reaction of the community constituted by the order against the evildoer. The individual who carries out the sanction acts as an agent of the legal order. This is equivalent to saying that the individual who carries out the sanction acts as an organ of the community constituted by the legal order. A social community is nothing but a social order regulating the

mutual behavior of the individuals subject to the order. To say that individuals belong to a certain community, or form a certain community, means only that the individuals are subject to an order regulating their reciprocal behavior. The legal sanction is thus interpreted as an act of the legal community; while the transcendental or religious sanction — the sickness or death of the sinner — is never interpreted as a reaction of the social group but always as an act of the superhuman, and therefore supersocial, authority.

5. THE MONOPOLY OF THE EMPLOYMENT OF FORCE

Among the paradoxes of the social technique here characterized as a coercive order is the fact that its specific instrument, the coercive measure, is of exactly the same sort as the act which it seeks to prevent in the relations of individuals; the sanction against the socially hurtful act is itself a hurtful act. For the threat of deprivation of life, health, freedom, or property is designed to keep individuals from depriving one another of life, health, freedom, or property. Force is employed to prevent the employment of force. This seems to be an antinomy, and the effort to avoid this social antinomy leads to the doctrine of absolute anarchism, which proscribes force even as a sanction. Anarchism tends to establish the social order solely upon voluntary obedience of the individuals. It rejects the technique of a coercive order and hence rejects the law as a form of organization.

The antinomy is only apparent, however. The law is,

to be sure, an ordering for the promotion of peace in that it forbids the use of force in relations among the members of the community. Yet it does not absolutely preclude the use of force. Law and force must not be understood as an absolute antithesis. Law is an organization of force: the law attaches certain conditions to the use of force in relations among men. It authorizes the employment of force, acts of coercion, only by certain individuals and only under certain circumstances. The law allows, under certain circumstances, conduct which under all other circumstances is "forbidden," or, in other words, is the very condition for similar conduct on the part of another as a sanction. The individual who, authorized by the legal order, applies the coercive measure — the sanction — acts as the organ of this order or of the community constituted thereby. Only this individual, only the organ of the community, is authorized to employ force. Hence one may say that the law makes the use of force a monopoly of the community. And precisely by so doing, law insures peace to the community.

Peace is a condition in which there is no use of force. In this sense of the word, the law provides only relative peace, in that it deprives the individual of the right to employ force but reserves it to the community. The peace of the law is not a state of absolute absence of force, a state of anarchy, but rather is a state of a monopoly of force, a monopoly of force by the community.

A community, in the long run, is only possible if each individual respects certain interests — life, health, freedom,

and property — of everyone else; that is to say, if each refrains from forcibly interfering in this sphere of interests of the other. The social technique called "law" consists in inducing individuals to refrain from forcible interference in the sphere of interests of others by a specific means: in case of such interference, the legal community will itself react with a like interference in the sphere of interests of the individual responsible. Like for like. It is the idea of retribution which lies at the base of this social technique. Only in a relatively late stage of evolution is the idea of retribution replaced by that of prevention. But then it is a change only of the ideology justifying the specific technique of the law. The technique itself remains the same.

Thus we see that forcible interference in a sphere of interests of another constitutes on the one hand an illegal act, a "delict," and on the other hand a sanction. Law is an order according to which the employment of force is generally forbidden as a delict, but exceptionally, under certain circumstances and for certain individuals, permitted as a sanction. In the rule of law, the employment of force appears either as a delict (the condition of the sanction) or as the sanction (the reaction of the legal community against the delict).

Inasmuch as forcible interference in the sphere of interests of individuals is permitted only as a reaction of the community against prohibited conduct of the individual and is made a monopoly of the community, a definite sphere of interests of the individuals is protected. On the

other hand, when the community has no monopoly of forcible interference in this sphere of interests — that is to say, when the social order does not stipulate that forcible interference in the sphere of interests of the individual may be resorted to only as a reaction against illegal interference in the sphere of interests of the individuals — then no sphere of interests of the individuals is protected by the social order. In other words, there is no state of law, which, in the sense developed here, is essentially a state of peace.

6. PSYCHIC COMPULSION, EFFICACY, AND VALIDITY OF THE LAW

To say that coercion is an essential element of law means solely that law is an order which provides coercive measures as sanctions. But a totally different meaning is frequently attributed to this statement. According to a widespread opinion, coercion considered as an essential element of law consists in the efficacy of the sanction provided by the legal norm. And the sanction is efficacious if men, in order to avoid the evil of the sanction, behave lawfully, or if the sanction is executed when its condition, the delict, has been fulfilled. Coercion in this sense, however, is merely psychic compulsion. It results from the idea men form of a legal norm. This idea is "coercive" if it furnishes a motive for the behavior prescribed by the legal norm. So far as this psychic compulsion goes, the law does not differ from moral or religious norms, for they, too, are coercive to the extent that the idea of them

becomes the motive for conduct conforming to the import of these norms. Law, however, is a coercive order not because the idea of the legal norm induces men to proper behavior, but because the legal norm provides a coercive measure as a sanction. The element of coercion is of the substance of the legal norm, not in the soul of the man subject to the legal norm. Whether or not men do actually behave in such a manner as to avoid the sanction threatened by the legal norm and whether or not the sanction provided in the legal norm is actually carried out are issues totally irrelevant to the concept of law. These questions pertain to the efficacy of the legal order — that is to say, to the fact that the norms of a legal order are really obeyed and applied. The specific existence of a legal order, or a system of norms, is not its efficacy but its validity. Validity means that the norms of the order ought to be obeyed and applied. The efficacy of a legal order, however — the fact that its norms are really obeyed and applied — is of a certain importance for the validity of the legal order. Only a legal order the norms of which are generally obeyed and applied is considered valid. It is not necessary that all the norms of this order be always and without exception obeyed or applied; but it is necessary that they be on the whole efficacious. Efficacy and validity are two completely distinct qualities; a judgment concerning efficacy is a judgment as to what is, a statement about natural reality; a judgment concerning validity is a judgment about what ought to be, a statement regarding legal reality, if one may so call the specific existence of the law as a system of valid

norms. The validity of the law presupposes a minimum efficacy of the law. Juristic thinking takes into account only validity, or the law as a valid order.

7. THE STATIC AND THE DYNAMIC CONCEPT OF LAW

In opposition to the view that the element of coercion is essential to law, it is argued that the positive legal order contains here and there provisions for whose non-observance no sort of sanction is provided but which nevertheless are considered legal norms. And in fact it is quite possible for the legislator to enact commandments without considering it necessary to attach criminal or civil sanctions to their violation. But if norms such as these are called laws it is because they issue from a law-creating authority. According to this concept, law is anything created in the way the constitution prescribes for the creation of law.

This concept differs substantially from the concept of law presented in these lectures. The former is dynamic; the latter, static. According to the dynamic concept, law is anything created by a certain process. This dynamic concept, however, is only apparently a concept of law; it contains no answer to the questions: What is the essence of law? what is the criterion by which law can be distinguished from other social forms? This dynamic concept furnishes an answer only to the question of whether or not and why a certain norm belongs to a certain system of legal norms, forms a part of a certain legal order. And the answer is, a norm belongs to a certain legal order if

it is created in accordance with the procedure prescribed by the constitution fundamental to this legal order.

It must be noted, however, that not only norms, that is, commands regulating human behavior, can be created in the way prescribed by the constitution for creating law. Let us take an example: An important stage in the law-creating process is the procedure by which general norms are created, that is, the procedure of legislation. The constitution may organize this procedure of legislation in the following way: (1) corresponding resolutions of the two houses of parliament, (2) the consent of the head of the state, and (3) publication in the official journal. This means that a specific form of law-creation is established. It is then possible to clothe any subject in this form, for instance, the recognition of the merits of a statesman. The form of a law, voted by parliament, consented to by the head of the state, published in the official journal, may be chosen in order to give to an expression of the gratitude of the nation the character of a solemn act. But the solemn recognition of the merits of a statesman is in no sense a norm, even if it appears as the content of a legislative act; even if it has the form of a law. The law as a product of legislative procedure, as a statute, is a document containing words and sentences; and that which is expressed by these sentences need not necessarily be a norm. As a matter of fact, many a law — in this sense of the term — contains not only legal norms, but also certain elements which are of no specific legal character, such as purely theoretical views concerning certain matters, the motives

of the legislator, political ideologies contained in such references as "justice" or "the will of God," etc., etc. All these are legally irrelevant contents of the statute, or, more generally, legally irrelevant products of the law-creating process. Even judgments of the courts very often contain legally irrelevant elements. If by the term "law" is meant something pertaining to a certain legal order, then law is anything which has been created according to the procedure prescribed by the constitution fundamental to this order. This does not mean, however, that everything which has been created according to this procedure is law in the sense of a legal norm. It is a legal norm only if it involves a command or if it purports to regulate human behavior, and if it provides a measure of coercion as a sanction. A norm expressed in a statute, but without the provision of a sanction, is only a counsel of the legislator.

It must be borne in mind, however, that the regulatory provision and the corresponding sanction may be contained in different statutes. Thus, for instance, the civil law of a given legal order may be contained in two different codes, one setting forth the substantive law, the other the adjective law, that is, the norms regulating the procedure leading ultimately to the civil sanction. The former cannot be applied without the latter, and *vice versa.* Only together do they form the civil law. The legal norms of the civil law are frequently composed of elements which are to be found in two different legal documents.

8. COMPLETE AND INCOMPLETE LEGAL NORMS

Certain norms of the constitution are frequently pointed out as legal norms which provide no sanction. If the legislator — so one says — prescribes a certain procedure for legislation, he does not usually attach any sanction to failure to observe this provision. Yet these provisions (so one says) are legal norms, the most important norms of constitutional law.

To this argument it may be answered that these provisions are not complete legal norms. They determine — like all provisions concerning the creation of law — only a certain condition common to all valid legal norms. If, for example, a concrete case is at issue involving the application of criminal law, the judge must determine, first, whether or not a punishable act as described in a rule of law has actually been committed; second, whether or not a certain definite penalty has been provided by the rule of law for refusal to behave in the manner prescribed by this rule of law; and third, whether or not this rule of law is really a "law" to be applied by the judge according to the constitution. The judge has to establish that the particular norm which he is supposed to apply has actually been created in the manner prescribed by the constitution. If the judge establishes that no punishable act has been committed, or that the norm which he is supposed to apply is not a law according to the constitution, — that is, not a norm created in the way the constitution prescribes for the creation of law, — then he will refuse to inflict a pun-

ishment upon the accused person. The first question, Is there *de facto* a concrete punishable act? and the third, Is there a constitutionally created rule of law providing a penalty for such an act? have the same importance; both concern conditions of the sanction provided in the legal norm — that is, in a norm which, according to the constitution, is to be applied by the courts and all other law-applying organs. The norms that regulate the creation of law — and that is essentially what the system of norms we call the constitution does — are rather to be regarded as norms by which an element is determined which is common to all legal norms providing sanctions, the provision regarding the procedure by which this norm must have originated in order to be applied as a valid norm.

9. THE RULE OF LAW AS A HYPOTHETICAL JUDGMENT

It has been pointed out that coercion is an essential element of the concept of law. The legal order is a coercive order. To induce individuals to a certain behavior the order attaches to the contrary behavior (the delict) a coercive measure (the sanction). If this analysis is correct, then it must be possible to describe the law of a certain community by a system of sentences stating that under certain conditions a certain measure of coercion (sanction) is to intervene. This sentence shows the basic form of the rule of law, using the term in a descriptive sense only. The rule of law, the term used in this descriptive sense, is a hypothetical judgment in which certain definite consequences are attached to certain definite conditions.

Grammatically speaking, the rules of law have the same form as the laws of nature by which natural science describes physical reality. The rule of law differs from the law of nature only in the specific meaning of the connection between condition and consequence. The law of nature states that under a certain condition, called the cause, a certain consequence, called the effect, actually takes place. The rule of law states that under certain conditions (among which the delict plays an important role) a certain consequence (a coercive measure, called the sanction) shall ensue. As an example of a law of nature: If a body is heated it actually expands. As an example of a rule of law: If a person steals, he is to be punished. The rule of law does not say, if a person steals, he will actually be punished. The connection between the theft and the punishment established by the rule of law is not the connection of cause and effect. The rule of law is valid even if in a concrete case the thief is not actually punished. The rule of law is not — as is the law of nature — a statement about physical reality. Therefore the establishment of the fact that in a concrete case a thief was not punished is not in contradiction to the rule of law, whereas the establishment of the fact that in a concrete case a heated body did not expand is in logical contradiction to the above-mentioned law of nature. The fact that in a concrete case a heated body did not expand is an exception to the law of nature, whereas the non-punishment of a delict can never be interpreted as an exception to the rule of law.

To say that it is legally forbidden to steal, that men are legally obliged to refrain from theft, or that it is the legal duty of men not to steal, means only that if an individual steals, he shall be punished. To say that I am legally obliged to pay back a loan means only that if I do not pay it back a specific measure of coercion, namely the forcible deprivation of my property in favor of my creditor, shall be directed against me. If the legal order does not provide a sanction in case a certain sum of money is not repaid, then there may be a question of a moral duty, but not of a legal duty, to restore the sum, and a moral but not a legal right to get it back. The statement that certain conduct forms the content of a legal duty means only that the legal order attaches to contrary conduct a certain measure of coercion, a sanction.

The formula expressing the rule of law as a hypothetical judgment — if the delict takes place the sanction is to take place — is simplified and abridged. Our analysis has shown that the delict is by no means the only condition of the sanction. A common condition of all sanctions stated in a rule of law is that the norm attaching a certain sanction to a certain delict has been created by a constitutional procedure. If, in a given case, the rules of civil law are involved and the sanction is the coercive measure we call civil execution, the sanction is conditioned by a complaint on the part of the individual whose interest is affected by the delict. The complaint is the initiation by the interested individual of a procedure leading ultimately to the application of the sanction. A legal transaction,

especially a contract, can also be interpreted as a condition of the civil sanction. Only if a contract of loan has in fact been made can the civil sanction be applied against the debtor who refuses to repay the amount received. Thus the rule of law describing this situation might be formulated as follows: If two individuals have made a contract of loan, and if the debtor refuses to pay back the sum received and if the creditor makes a complaint, then a certain measure of coercion shall be directed against the debtor. Even this formula is simplified and abridged. It shows only certain very characteristic elements of the rule of law in question.

10. THE ILLEGAL ACT (DELICT)

From the foregoing it is also apparent that the delict, in the given example omission to pay the debt, is not the sole condition of the sanction, but one of the conditions, and hence, juristically, that is, from the point of view of a consideration directed only to the legal norms and their substance, the delict can be characterized only as "one condition of the sanction." But this is not a sufficient determination of the concept of delict. It is no juristic determination of the concept of delict to characterize it as a "violation" of the law, as conduct "contrary" to the law, or even as "unlawful" or "illegal" behavior — in other words, as a negation of law. All these are only figurative or descriptive expressions which attest the fact that the delict is behavior which runs counter to the purpose of the law. The purpose of the law, however, lies beyond the

limits of its substance, which alone is the object of analytical jurisprudence. The delict as a violation or negation of law is a metajuristic concept.

From the standpoint of juristic thought, a delict is not a violation or negation of law, but a condition specified by the law. It is the fundamental condition for the application of the law, for the execution of the sanction established by the law. All law is indeed set up for the very contingency of a delict being committed. Only by the fact that a sanction is attached to certain conduct does this conduct become a delict in the juristic sense. Only if a sanction is attached to certain conduct can that conduct be called juristically "illegal," "contrary to law," "unlawful." Only then do these figurative or descriptive terms have juristic meaning. Delict and sanction are correlative ideas.

If the delict is to be characterized juristically as a condition of the sanction, it must be pointed out how this condition is distinguishable from other conditions of the sanction, how the conduct characterized as delict is recognizable. The delict is the conduct of the individual against whom the sanction is directed — that is, the individual who is obligated to abstain from the conduct constituting the delict, to conduct himself "lawfully." He — the potential delinquent, the subject of the legal duty — and only he is responsible for the delict.

This individual responsibility of the delinquent for the delict committed by him is only the normal case, however. It may happen that the sanction is not directed

against the individual who has committed the delict, but against another individual. In this case, an individual is made responsible for a delict that another has committed. This is the reason why it is desirable to distinguish between the concept of obligation or legal duty and that of responsibility or liability. For the individual who by his conduct committed the delict and who was obligated to abstain from the delict may, exceptionally, be a different individual from him against whom the sanction was directed in case a delict might be committed. The delict may be committed by a different individual from him who is responsible for the delict. Thus Jehovah punishes the children and children's children for the sins of their fathers; thus the blood revenge of primitive law is directed against all the relatives of the murderer. This is collective responsibility. This form of responsibility is one of the elements by which international law is characterized.

The sanction is directed against someone other than the immediate delinquent only if there exists between this other and the individual responsible for the delict a definite relationship, specified by the legal order. The individual or individuals responsible for the delict must belong to the same social group — to the same family, to the same community — as the individual who committed the delict. This relationship permits the identification of those responsible for the delict with the delinquent. It is this identification which lies at the base of collective responsibility; and collective responsibility is only a special manifestation of the collectivistic thinking so characteristic of

primitive peoples in general. The sanction is directed against the community to which the delinquent belongs; the whole community is responsible for the delict, since the whole community, according to this collectivistic view, has committed the delict. The delict is not the act of a single individual, but of his community, and hence the sanction is directed against this community, because it is directed against all its members.

Delict and sanction: these are the two fundamental facts of the law. To connect them as condition and consequence is the fundamental function of the law. If the rule of law describes this connection in a hypothetical judgment which attaches a measure of coercion as a sanction to certain conditions, among which the delict has its specific place, it expresses the very essence and nature of law.[1]

[1] Cf. my *Reine Rechtslehre* (1934) and my article, "The Pure Theory of Law and Analytical Jurisprudence," *Harvard Law Review*, LV (1941), 44–70.

LECTURE II

THE NATURE OF INTERNATIONAL LAW

I. THE PROBLEM OF INTERNATIONAL PEACE

IN POLITICAL discussions of today two questions predominate: How can economic life be satisfactorily organized within the national community, the state, without abolishing the personal freedom of the individual? and how can war or any other use of force be prevented within the international community, in the relation between states? In trying to answer the second question we turn at once to the individual state, where in the relations between citizens the goal has been attained in principle. Except under certain extraordinary conditions such as revolution or civil war, the employment of force has been effectively eliminated from the relations between citizens and reserved for a central organ authorized to use force only as a reaction against illegal acts.

It seems natural, therefore, to unite all these individual states, or at least as many as possible, into a world-state, and to concentrate all their means of power and place them at the exclusive disposal of a central government; or in other words, to subject as many states as possible to a legal order which, as far as the degree of its centralization is concerned, would be on a par with the legal order of the states themselves.

At the present time, under present political circumstances, the idea of such a world-state is hardly more than a Utopian scheme, even if this world-state is represented as a relatively decentralized federal state and is referred to by the inoffensive term of a union of states. From a realistic point of view, the solution of the problem of peace can be sought only within the frame of international law, that is to say, by an organization which in the degree of its centralization does not exceed that compatible with the nature of international law. If this degree of centralization is exceeded, the international community is transformed into a national community, a state; for it is essentially in the degree of centralization that an international community constituted by international law differs from a national community constituted by national law, a union of states from a state. The international community is a decentralized community, decentralized in a specific manner, whereas the state is a centralized community. A solution of the peace problem within the frame of international law means, therefore, a solution of the peace problem through an international organization whose centralization does not go so far that international law will be eliminated in the relations between the states embraced by the organization; a solution of the peace problem by the establishment of a community of states without altering the law governing the relations between these states to such an extent that this law ceases to be international law and becomes national law.

Such a solution of the peace problem is a political task,

and, like every political task, has a technical character. It is a question of organizing a community of states through the specific means offered by international law. To achieve this end one must know the nature of international law, its organic structure. Therefore I shall first address myself to the question of the nature of international law. One can hardly formulate this question except by asking whether or not the norms called international law are law in the same sense as the norms of national law. This question is by no means merely a theoretical one. For if international law is law in the same sense as national law, if the international community of states is, in principle, the same social phenomenon as the national community of individuals, it may be presumed that international law is susceptible to the same evolution as national law. If this be true, then a relatively certain way is opened to the successful reform of international legal relations.

2. THE LEGAL CHARACTER OF INTERNATIONAL LAW

Scientifically formulated, the question whether or not international law is law in the sense of the definition established in the first lecture is the question whether or not the legal material commonly called international law can be described in rules of law, using this term in a purely descriptive sense.[1]

A rule of law, as was stated in the first lecture, is a hypothetical judgment according to which a coercive act,

[1] Cf. my *Théorie générale du droit international public*, Académie du droit international, Recueil des Cours, vol. XLII (1932).

forcible interference in the sphere of a subject's interests, is attached as a consequence to certain conduct of that subject. The coercive measure which the rule of law provides as the consequence is the sanction; the conduct of the subject set forth as the condition is the delict. The sanction is interpreted as a reaction of the legal community against the delict. The delict is undesirable behavior, especially forcible interference in the sphere of interests of another subject, a coercive act. The coercive act is therefore either a delict, a condition of the sanction — and hence forbidden — or a sanction, the consequence of a delict — and hence permitted. This alternative is an essential characteristic of the coercive order called law.

International law is law in this sense if a coercive act on the part of a state, the forcible interference of a state in the sphere of interests of another, is permitted only as a reaction against a delict and the employment of force to any other end is forbidden — only if the coercive act undertaken as a reaction against a delict can be interpreted as a reaction of the international legal community. If it is possible to describe the material which appears in the guise of international law in such a way that the employment of force directed by one state against another can be interpreted only as either delict or sanction, then international law is law in the same sense as national law.

In speaking of international law, reference is made only to general or common international law, not to particular international law. General or common international law is customary law, valid for all the states belonging to the

international community. Particular international law is valid for a few states only, and comprises especially norms created by international treaties valid only for the contracting parties. There is as yet no international treaty concluded by all states, no general or common international law created by international treaty. Even treaties concluded by many states, such as the Covenant of the League of Nations or the Kellogg Pact, constitute not general, but particular international law.

The problem must therefore be formulated as follows: first, is there according to general international law such a thing as a delict, conduct of a state usually characterized as illegal? Second, is there according to general international law such a thing as a sanction, a coercive measure provided as the consequence of a delict, and directed against a state which conducts itself illegally — a deprivation of possessions by the employment of force if necessary, a forcible interference in the normally protected sphere of interests of the state responsible for the delict? From what was said in the first lecture, it follows that, juristically, specific conduct of a state can be considered a delict only if international law attaches to this conduct a sanction directed against the state.

3. DELICT AND SANCTION IN INTERNATIONAL LAW

It is a commonly accepted fact that there exists in international law such a thing as a delict, that is, conduct of a state which is considered illegal. This follows from the fact that international law is regarded as a system of norms

which prescribe certain conduct for states. If a state without a specific reason recognized by international law invades territory which according to international law belongs to another state, or if a state fails to observe a treaty concluded with another state according to international law, its conduct is considered contrary to the order just as the conduct of an individual who lies is considered contrary to the moral order. In this sense there is without doubt a delict in international law.

But is there in international law such a thing as a delict in the specifically juristic sense, that is, is there also a sanction prescribed by international law, a sanction directed against the state responsible for the delict?

By "sanction in international law" many theorists mean the obligation to repair the wrong, especially illegally caused damage. This is, so to speak, a substitute obligation, a duty which arises when a state has failed to fulfill its main or original obligation. The duty to make reparation replaces the obligation violated. It is doubtful, however, whether the obligation to make reparation is provided by general international law as a consequence of the delict or is only the result of a treaty concluded between the state affected by the delict and the state responsible for it. I, personally, incline to the latter view.[2] But even if the obligation to make reparation is provided by general international law as a consequence of the delict, this substitute obligation cannot be considered a sanction. Only the consequence of failure to fulfill this substitute

[2] Cf. my "Unrecht und Unrechtsfolge im Völkerrecht," *Zeitschrift für öffentliches Recht*, XII (1932), 481 ff.

obligation, the last consequence stated by the rule of law, constitutes a true sanction. The specific sanction of a legal order can only be a coercive measure, provided by the legal order in case an obligation is violated, and, if a substitute obligation is established, in case this substitute obligation also is violated. Are there coercive measures provided by general international law as consequences of international delicts? Are there forcible interferences in the normally protected spheres of interests of the states responsible for the delicts? These are the questions.

4. REPRISALS

If all the material known under the name of international law be investigated, there appear to be two different kinds of forcible interference in the sphere of interests of a state normally protected by international law. The distinction rests upon the degree of interference: whether this interference is in principle limited or unlimited, whether the action undertaken against a state is aimed solely at the violation of certain interests of this state, or is directed toward its complete submission or total annihilation.

As to the characterization of limited interference in the sphere of interests of one state by another, a generally accepted opinion prevails. Such an interference is considered either as a delict in the sense of international law, or as a reprisal. It is permitted as a reprisal, however, only insofar as it takes place as a reaction against a delict. The idea that a reprisal, a limited interference in the normally protected sphere of interests of another state, is only admissible as a reaction against a wrong committed by

this state has been universally accepted and forms an undisputed part of positive international law. It is not essential that interference in the sphere of interests of a state, undertaken as a reprisal, be accompanied by the use of force. But the use of force in a resort to reprisal is permissible, especially if resistance makes it essential. Similarly, the sanctions of national law, punishment and civil execution, are executed by force only in the case of resistance.

There is nothing to prevent calling a reprisal a sanction of international law. Whether this is true also as to unlimited interference in the sphere of interests of another state remains to be seen. Such an interference is usually called war, because it is an action executed by armed force, by the army, the navy, and the air force. This action, too, has a forcible character only if it meets with resistance. The problem therefore becomes: What is the meaning of war according to international law? Is it possible to interpret war, like the limited interference in the sphere of interests of another state, as either a delict or a sanction? In other words, is it possible to say that according to international law war is permitted only as a sanction, and any war which has not the character of a sanction is forbidden by international law, is a delict?

5. THE TWO INTERPRETATIONS OF WAR

Two diametrically opposite views exist as to the interpretation of war. According to one opinion, war is neither a delict nor a sanction. Any state that is not expressly

bound by special treaty to refrain from warring upon another state, or to resort to war only under certain definite conditions, may proceed to war against any other state on any ground without violating international law. According to this opinion, therefore, war can never constitute a delict, for the behavior of a state which is called war is not forbidden by general international law and hence to this extent is permitted. But, according to this opinion, war cannot constitute a sanction either, for there is in international law no special provision which authorizes the state to resort to war. War is not set up by international law as a specific reaction against illegal conduct on the part of a state.

The opposite opinion, however, holds that according to general international law war is forbidden in principle. It is permitted only as a reaction against an illegal act, a delict, and only when directed against the state responsible for this delict. As with reprisals, war has to be a sanction if it is not to be characterized as a delict. This is the theory of *bellum justum.*

It would be naïve to ask which of these two opinions is the correct one, for each is sponsored by outstanding authorities and defended by weighty arguments. This fact in itself makes any definite choice between the two theories extremely difficult. By what arguments can the thesis be attacked or defended that according to general international law no war is permissible save as a reaction against a wrong suffered, against a delict? The mere statement of the problem in this form suggests that the posi-

tion of those who represent the theory of *bellum justum* is more difficult to maintain, for the burden of proof is theirs, while the opposite view limits itself to a denial of this thesis, and, as is well known, *negantis major potestas.*

6. THE DOCTRINE OF "BELLUM JUSTUM"

If it be asked how it is possible to prove the thesis of the *bellum justum* theory — that general international law forbids war in principle — the first difficulty is encountered. According to strict juristic thinking, a certain conduct is prohibited within a certain legal system when a specific sanction is attached to such conduct. The only possible reaction that can be provided by general international law against an unpermitted war is war itself, a kind of "counter-war" against the state which resorted to war in disregard of international law. No other sanction is possible in view of the actual technical condition of general international law. But this implies that war, or to be more exact, counter-war, must be presupposed as a sanction in order that war may be interpreted as a delict. Such a view, however, obviously begs the question, and it is, therefore, logically impracticable to prove the thesis of the *bellum justum* theory. But there is another way to go about it, namely to examine the historical manifestations of the will of the states — diplomatic documents, especially declarations of war and treaties between states. All these show quite clearly that the different states, that is to say, the statesmen representing them, consider war an illegal act, in principle forbidden by general international law,

permitted only as a reaction against a wrong suffered. This proves the existence of a legal conviction corresponding to the thesis of the *bellum justum* theory. This conviction manifests itself in the fact that the governments of states resorting to war always try to justify so doing to their own people as well as to the world at large. There is hardly an instance on record in which a state has not tried to proclaim its own cause just and righteous. If such proclamations do not appear in the official declarations of war, they can be found in other documents, or perhaps in the state-controlled press. Never yet has a government declared that it was resorting to war only because it felt at liberty to do so, or because such a step seemed advantageous. An examination of the various justifications for resorting to war reveals that it is usually contended that the other state has done wrong, or is on the verge of doing so, by committing an unwarranted act of aggression, or at least preparing such an act, or by violating certain other legitimate interests, or having the intention of so doing. There can be little doubt that, on the whole, national public opinion, like international public opinion, disapproves of war and permits it only exceptionally as a means to realize a good and just cause. The most radical exponents of war, the most extreme philosophers of imperialism, in their attempts to glorify war and to vilify pacifism, justify war only as a means to a good end.

Even if such justification is of moral rather than strictly legal significance it is of great importance; for, in the last analysis, international morality is the soil which fosters

the growth of international law. It is international morality which determines the general direction of the development of international law. Whatever is considered "just" in the sense of international morality has at least a tendency of becoming international "law."

7. THE IDEA OF "BELLUM JUSTUM" IN POSITIVE INTERNATIONAL LAW

It is easy to prove that the theory of *bellum justum* forms the basis of a number of highly important documents in positive international law, namely, the Treaty of Versailles, the Covenant of the League of Nations, the Kellogg Pact.

Article 231 of the Treaty of Versailles justified the reparations imposed on Germany by maintaining that Germany and its allies were responsible for an act of aggression. This means that Article 231 characterized this aggression as an illegal act, a delict, which would have been impossible if the authors of the Peace Treaty had shared the opinion that every state had a right to resort to war for any reason against any other state. If the aggression which Germany was forced to admit had not been considered "illegal," it could not have been relied on to justify Germany's obligation to make reparation for the loss and damage caused by the aggression. The Treaty of Versailles did not impose upon Germany a "war-indemnity," but a duty to make "reparations" for illegally caused damages. The aggression of Germany and its allies was considered illegal because the war to which they resorted

in 1914 was considered to be a war "imposed" upon the Allied and Associated Governments. This can mean only that Germany and its allies resorted to war without sufficient reason, that is, without themselves having been wronged by the Allied and Associated Powers or by any one of them.

Article 15, paragraph 7, of the Covenant of the League of Nations permits members of the League, under certain conditions, to proceed to war against other League members, but only "for the maintenance of right and justice." Only a just war is permitted.

The Kellogg Pact forbids war, but only as an instrument of national policy. This is a very important qualification of the prohibition. A reasonable interpretation of the Kellogg Pact, one not attempting to make of it a practically useless and futile instrument, is that war is not forbidden as a means of *international* policy, especially not as a reaction against violation of international law, as an instrument for the maintenance and realization of international law. This is exactly the idea of the *bellum justum* theory. Since, however, the Covenant of the League of Nations and the Kellogg Pact are only instances of particular international law, these statements dealing with the "illegality" of war must be considered merely indications of the actual existence of a commonly accepted international legal conviction.

8. THE IDEA OF "BELLUM JUSTUM" IN PRIMITIVE SOCIETY

The legal conviction just mentioned is by no means an achievement of modern civilization. It is to be found under the most primitive conditions. It is unequivocally expressed even in the relationship of wild tribes. To understand the inter-tribal relationships of primitive society one must realize that primitive man makes a definite distinction between a violation of tribal interests (particularly the killing of a member of his own tribe) by a member of that tribe, and the same deed performed by a member of a foreign tribe. From a sociological point of view, this distinction is of the greatest importance, for primitive man is not yet aware of death due to natural causes. Interpreting the facts of nature solely by social categories, he sees in every death either a punishment imposed by a superhuman authority, or a murder. And murder can be committed either by a visible act of another individual, or by means of magic. Hence death can always be interpreted as murder if for some reason its interpretation as punishment is not possible or desirable. Primitive man considers death and sickness as well not as "natural" but as social phenomena, because to him all nature forms a part of society, that is, of his social group. The dualism of nature and society, a characteristic element of modern thinking, is completely unknown to the primitive mentality.

In the early stages of social development, a violation of the social order attributed to a member of the group will

not be vindicated by the group itself through socially organized reaction. There is no punishment of the murderer by the whole group, no duty of the relatives of the murdered person to avenge his death. This does not mean, however, that there is no sanction at all. It only implies that sanctions are not the reaction of the group, that they are not yet socially organized, like the vendetta or the punishment meted out by a tribal chieftain. The first sanction for wrongdoing committed by one of its members within the smallest group — the family, for instance — is a transcendental sanction. A superhuman authority, a god, punishes a crime committed by one in the bosom of his family. The first gods are the souls of deceased ancestors, who jealously watch out for the strict maintenance of social order by their descendants. In the case of murder, it is the spirit of the murdered individual, of the murdered father or the murdered mother, who punishes the murderer by sickness or death. It is extremely significant that the belief in the soul of the dead is socially determined. Direct action of the soul of a murdered man is originally at least confined to his own group; the soul of a murdered man can avenge itself directly only upon the members of his own group, that is to say, his relatives, by spreading sickness or death. It seems that originally at least the soul of the dead was unable to avenge itself directly upon a murderer belonging to another group. In such a case it could only instigate its living relatives to wreak vengeance upon the murderer or upon his group. Only if the relatives of a dead man believe that

his death was caused directly or indirectly by a member of another group do they feel themselves obligated to the soul of the dead to avenge the crime. This is the origin as well as the ideological-religious background of the so-called vendetta, which originally was always directed against an outside group.

Normally a war between primitive tribes or groups is essentially a vendetta, an act of revenge; as such it is a reaction against a violation of certain interests, a reaction against what is considered a wrong. The vendetta is probably the original form of socially organized reaction against a wrong, the first socially organized sanction.

Now, if law is the social organization of sanction, the original form of law must have been inter-tribal law, and, as such, a kind of international law. This is the reason why any theory of international law has to consider the origins of law. The original inter-tribal law was, in its very essence, the principle of "just war." Arthur S. Thomson, reporting on the wars of the Maoris, the primitive aborigines of New Zealand, has this to say: "Every war has an apparent just cause. The motive may have been slight, but there was a lawfulness for it, looking at the question with the ideas of New Zealanders." [3] And the well-known ethnologist A. R. Radcliff-Brown describes the wars between the very primitive Australians as follows: "The waging of war is in some communities, as among the Australian hordes, normally an act of retaliation, carried out by one group against another that is held

[3] Arthur S. Thomson, *The Story of New Zealand* (1859), I, 123.

responsible for an injury suffered, and the procedure is regulated by a recognized body of customs which is equivalent to the international law of modern nations." [4] In general, this is typical of all wars among primitive peoples. If international law is a primitive law — as will be shown later — then it is quite natural that the principle of *bellum justum* has been conserved in this legal order.

9. THE IDEA OF "BELLUM JUSTUM" IN ANTIQUITY, THE MIDDLE AGES, AND MODERN TIMES

It is therefore not surprising that one encounters the idea of *bellum justum* in the inter-state law of the ancient Greeks. In his well-known book on the legal customs of the early Greeks and Romans, Coleman Phillippson says: "No war was undertaken without the belligerents alleging a definite cause considered by them as a valid and sufficient justification therefor." [5] Even Roman imperialism believed it could not get along without an ideology by means of which its wars could be justified as legal actions. The law of war was closely connected with the so-called *jus feciale*. Only such wars were considered "just wars" as were undertaken in observance of the rules of the *jus feciale*. These rules had, it is true, essentially only a formal character, but Cicero, who may be regarded as the representative legal philosopher of ancient Rome, and who on this point, too, probably only expressed the

[4] A. R. Radcliff-Brown, "Primitive Law," *Encyclopaedia of the Social Sciences*, ed. by E. R. A. Seligmann and A. Johnson, IX (1933), 203.

[5] Coleman Phillippson, *The International Law and Custom of Ancient Greece and Rome* (1911), II, 179.

generally prevailing public opinion, stated that only such wars could be considered legal actions as were undertaken either for reasons of defense or for reasons of vengeance: *Illa injusta bella sunt quae sunt sine causa suscepta, nam extra ulciscendi aut propulsandorum hostium causam bellum geri justum nullum potest* ("Wars undertaken without reason are unjust wars, for except for the purpose of avenging or repulsing an enemy, no just war can be waged.")[6]

Saint Augustine and Isidoro de Sevilla were influenced in their theory of "just war" by Cicero,[7] and from the writings of these Christian authors the theory of "just war" was taken over by the *Decretum Gratiani*, to be ultimately incorporated into the *Summa Theologiae* of St. Thomas Aquinas. It became the dominating doctrine of the Middle Ages, only to be absorbed by the natural-law theories of the sixteenth, seventeenth, and eighteenth centuries. Grotius in particular expounded the view that according to natural law every war must have a just cause, and that, in the last analysis, this "just cause" can only be a wrong suffered.[8] This idea, which remained predominant until the end of the eighteenth century, disappeared almost entirely from the theories of positive international law during the nineteenth century, although it still formed the basis of public opinion and of the political ideologies

[6] Cicero, *De republica*, III, 23.

[7] Cf. William Ballis, *The Legal Position of War* (1937), pp. 27 ff.

[8] Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (Classics of International Law. Oxford: Clarendon Press, 1925), II, 170: "No other just cause for undertaking war can there be excepting injury received."

of the different governments. Only after the close of the first World War was this doctrine of *bellum justum* again taken up by certain authors.[9]

10. ARGUMENTS AGAINST THE "BELLUM JUSTUM" THEORY

The different arguments against the theory that according to general international law war is in principle forbidden, being permissible only as a reaction against a violation of international law, are of varying importance. Certainly the weakest of them, current during the nineteenth century, is that which was most frequently and most successfully relied upon during that period, namely, that it would be inconsistent with the sovereignty of a state to limit its right to resort to war. According to this view, it is especially in war that the sovereignty of a state manifests itself, and sovereignty is the true essence of the state. Undoubtedly, any norm which forbids a state to resort to war against another state, save as a reaction against a wrong suffered by it, is contrary to the idea of the sovereignty of a state. This argument is directed not so much against the theory of *bellum justum*, however, as against international law in general, against every normative legal ordering of the conduct of states. For any legal order obligating states to behave in a certain manner can be conceived only as an authority above the states, and is, therefore, incompatible with the idea of their sovereignty; for to attribute sovereignty to a state means that it is itself the highest authority, above and beyond which

[9] Cf. Leo Strisower, *Der Krieg und die Völkerrechtsordnung* (1919).

there can be no higher authority regulating and determining its conduct. This particular argument does not really constitute a conception of international law opposed to the theory of *bellum justum*. It does not afford a different answer to the question of the content of positive international law. It rather denies international law *in toto* as a legal order obligating and authorizing states. Any discussion of the legal importance of war, however, presupposes the existence of a legal order obligating and authorizing states.

A more serious argument is that everything which can be said in favor of the *bellum justum* theory proves only that war is morally forbidden. It does not prove that positive international law forbids war in principle, permitting it only as a reaction against a wrong suffered. To this it might be replied that should it be possible to prove that states, or the individuals representing them, actually base their reciprocal behavior on the idea that any war which is not a reaction against a wrong itself constitutes a wrong, that only a war waged to right a wrong is a justifiable war, there would seem to be no good reason why this kind of war should not be regarded as a sanction. And if this is so, the judgment regarding the nature of war is definitely a "juristic judgment." Under these circumstances, it is possible to describe the phenomenon "war" in its relation to other phenomena in the form of a legal rule, using the term in a purely descriptive sense. Thus any war that is not merely a sanction can be characterized legally as a "delict."

Particularly serious is the objection that war of one state against another could never be set up as a sanction because for technical reasons no war can function as a sanction. War never guarantees that the wrongdoer alone will always be hit by the evil which a sanction is supposed to mete out. In war not he who is in the "right" is victorious, but he who is the strongest. For this reason, war is out of the question as a reaction against a wrong, when the party which suffered this wrong is the weaker of the two. There can be no question of a sanction unless there exists an organization to apply the measure of coercion with powers so far superior to the power of the wrongdoer that no serious resistance is possible.

The most striking objection to the theory of just war, however, is the one which claims that according to general international law war can be interpreted neither as a sanction nor as a delict. Who is to decide the disputed issue as to whether one state actually has violated a right of another state? General international law knows no tribunal to decide this question. It can be decided, therefore, only through mutual agreement between the parties. But this would be the exception, since a state will hardly admit having violated the rights of another state. If no agreement be reached between the parties to the conflict, the questions of whether or not international law has actually been violated and who is responsible for the violation cannot be uniformly decided, and certainly not — as is now and then believed — decided by the science of law. Not the science of law, not jurists, but only and

exclusively the governments of the states in conflict are authorized to decide these questions. If there is no uniform answer to the question of whether in a given case there has been a delict, then there can be no uniform answer to the question of whether the war waged as a reaction against what is claimed to have been a delict is actually a "just war" — whether the character of this war is that of a sanction or of a delict. Thus the distinction between war as sanction and war as delict would become highly problematical. Moreover, there is no apparent difference between the theory which holds that the state has a right to resort to war whenever and against whomever it pleases and the theory which holds that war is permitted only as a reaction against a delict, any other war being itself a delict, but at the same time has to admit that within general international law it is almost impossible satisfactorily to apply these principles in a concrete instance.

II. THE PRIMITIVE LEGAL ORDER

The attempt to meet all these objections is by no means intended to veil the theoretical difficulties of the enterprise. Both the objections raised against the theory of *bellum justum* (and therefore against the legal character of international law in general) are grounded primarily on the technical insufficiency of general international law. This insufficiency is quite apparent, not only as to the points upon which the arguments against the theory of *bellum justum* are based, but also in other highly important issues, as will be shown later.

In its technical aspects, general international law is a primitive law, as is evidenced among other ways by its complete lack of a particular organ charged with the application of legal norms to concrete instances. In primitive law the individual whose legally protected interests have been violated is himself authorized by the legal order to proceed against the wrongdoer with all the coercive measures provided by the legal order. This is called self-help. Every individual takes the law into his own hands. Blood revenge is the most characteristic form of this primitive legal technique. Neither the establishment of the existence of a delict nor the execution of the sanction is conferred upon an authority distinct from the parties involved or interested. In both these aspects the legal order is entirely decentralized. There is neither a court nor a centralized executive power. The relatives of the murdered person, the mourners, must themselves decide whether an avenging action should be undertaken, and if so, against whom they should proceed.

Nevertheless, in a primitive community the man avenging the murder of his father upon one whom he considers to be the murderer is himself regarded not as a murderer but as an organ of the community; for by this very act he executes a norm of the social order constituting the community. It is this norm which empowers him and him only, under certain circumstances and under these circumstances only, to kill the suspected murderer. This same man would not be acting as an organ or instrument of his community, but merely as a murderer himself, should

this same action on his part be prompted by circumstances other than those provided by the legal order of his community; should he not be acting merely as an avenger.

The distinction between murder as a delict, and manslaughter as a fulfillment of a duty to avenge, is of the greatest importance for primitive society. It means that killing is only permitted if the killer acts as an organ of his community, if his action is undertaken in execution of the legal order. The coercive measure is reserved to the community, and is, in consequence, a monopoly of the community. The decentralization of the application of the law does not prevent the coercive measures as such from being strictly monopolized. This is the way such events are interpreted in primitive society; and this interpretation is one of the most important ideological foundations of primitive society, although it may well be doubted whether in a concrete instance the killing constitutes merely an avenging act — a sanction — or should itself be regarded as a delict, and despite the fact that blood revenge is hardly a suitable means for protecting the weak against the strong. The latter fact in particular leads to certain phenomena very interesting from a sociological point of view — the institution of sham revenge, certain rituals which take the place of real vendetta, when it would be too risky in the face of the superior forces of the opponent actually to execute the duty of revenge.

A social order still resting on the principle of self-help may produce a state of affairs leaving much to be desired. Nevertheless it is possible to consider this state a legal state,

and this decentralized order a legal order; for this order can be interpreted as an order according to which coercive measures are a monopoly of the community. And it is permissible to interpret the primitive social order in this way because the individuals subjected to this order themselves interpret it in this way.

History teaches that evolution everywhere proceeds from blood revenge toward the institution of courts and the development of a centralized executive power; that is, toward steadily increasing centralization of the coercive social order. It is entirely justifiable to call the still decentralized coercive social order of primitive society by the name of law, in spite of its rather crude technique; for this decentralized order constitutes the first step in an evolution which ultimately leads to the law of the state, a centralized coercive order. As the embryo in a woman's womb is from the beginning a human being, so the decentralized coercive order of primitive self-help is already law — law *in statu nascendi.*

12. INTERNATIONAL LAW AS PRIMITIVE LAW

From what has been said so far it may be inferred that general international law, characterized by the legal technique of self-help, can be interpreted in the same manner as a primitive legal order, characterized by the institution of blood revenge (vendetta). This primitive law can be understood only if we distinguish — as does the primitive man — between killing as a delict and killing as a sanction. In order to understand international law, a differen-

tiation must be made between war as a delict and war as a sanction, despite the fact that the practical application of this distinction in a concrete instance might be difficult — in some cases even impossible — and although war, like vendetta, is technically insufficient as a sanction.

Everything that has been said against interpreting war as a sanction can also be said against reprisals; yet the opponents of the theory of *bellum justum*, which acknowledges war only as sanction, do not find it necessary to use their arguments against interpreting reprisals as sanctions. Should we, however, contrary to the *bellum justum* theory refuse to regard war as in principle forbidden (permitted only as a reaction against a delict), we should no longer be in a position to conceive of general international law as an order turning the employment of force into a monopoly of the community. Under these circumstances, general international law could no longer be considered as a legal order. If the unlimited interference in the sphere of another's interests called "war" is not in principle forbidden by general international law, if any state is at liberty to resort to war against any other state, then international law fails to protect the sphere of interests of the states subjected to its order; the states have no protected sphere of interests at all; and the condition of affairs created by so-called international law cannot be a legal state. Whether or not international law can be considered as true law depends upon whether it is possible to interpret international law in the sense of the theory of *bellum justum*, whether it is possible to assume that, according

to general international law, war is in principle forbidden, being permitted only as a sanction, that is, as a reaction against a delict.

The opponents of the theory of just war, or at least the majority among them, do not intend to question the legal character of international law. On the contrary, they insist upon calling international law true law. For this very reason, they do not deny that reprisals, that is, the limited interference in the sphere of interests of a state, are permitted only as a reaction against a wrong, as a sanction. This is in truth a more than paradoxical result of an interpretation of international law: no state would be entitled to a limited interference in the sphere of interests of another state, but any state would be fully justified in committing an unlimited interference in such a sphere. According to this interpretation, a state violates international law if it causes limited damage to another state, and in this case its enemy is authorized to react against it with reprisals. But the state does not violate international law and does not render itself liable to a sanction if its interference in the sphere of interests of the other state is adequate to afflict the whole population and the whole country of its enemy with death and destruction. This is similar to a social order according to which petty thievery is punished while armed robbery goes free. Such an order is logically not impossible, but it is politically very improbable that a positive social order, especially international law, should have such a content, even if the intention of the order to reserve the employment of force to the

community, to establish a monopoly of force in the community, be imperfectly realized.

The technical inadequacies of general international law do indeed to a certain extent justify the interpretation of the opponents of the *bellum justum* theory. But he who accepts this interpretation must be consistent; he must not regard international law as true law. The opposite interpretation, however — that based on the *bellum justum* theory — is also possible, as has been shown in this lecture. The situation is characterized by the possibility of a double interpretation. It is one of the peculiarities of the material which forms the object of the social sciences to be sometimes liable to a double interpretation. Hence, objective science is not able to decide for or against one or the other.

It is not a scientific, but a political decision which gives preference to the *bellum justum* theory. This preference is justified by the fact that only this interpretation conceives of the international order as law, although admittedly primitive law, the first step in an evolution which within the national community, the state, has led to a system of norms which is generally accepted as law. There can be little doubt that the international law of the present contains all the potentialities of such an evolution; it has even shown a definite tendency in this direction. Only if such an evolution could be recognized as inevitable would it be scientifically justified to declare the *bellum justum* theory the only correct interpretation of international law. Such a supposition, however, reflects political wishes rather than scientific thinking. From a strictly

scientific point of view a diametrically opposite evolution of international relations is not absolutely excluded. That war is in principle a delict and is permitted only as a sanction is a possible interpretation of international relations, but not the only one. We choose this interpretation, hoping to have recognized the beginning of a development of the future and with the intention of strengthening as far as possible all the elements of present-day international law which tend to justify this interpretation and to promote the evolution we desire.

LECTURE III

INTERNATIONAL LAW AND THE STATE

I. MONOPOLIZATION AND CENTRALIZATION OF THE EMPLOYMENT OF FORCE

I HAVE answered the question whether so-called international law is law in the same sense as national law by saying that it is possible, though not necessary, to regard the material called international law as true law. For it appears as an ordering of the mutual conduct of states which exhibits the essential elements of a legal order. Any forcible interference by a subject in the sphere of interests of another subject is in principle forbidden, being permitted only as a reaction against a violation of the order, that is to say, only as a reaction of the community. International law can be regarded as true law because it can be regarded as a coercive order which reserves to the international community the use of force — establishes a monopoly of the use of force.

As was pointed out in the last lecture, monopolization of the use of force means that forcible interference in the sphere of interests of one subject to the order must be regarded as either a delict or a sanction. If this is the case, then a subject who, empowered by the order, applies against a violator of the order a sanction prescribed by the order — in other words, executes the order against a vio-

lator of the order — such a subject appears as an organ of the order, and hence as an organ of the community constituted by the order. This means that if the act of coercion instead of being a delict is permitted by the order as a sanction, because it is a reaction against a delict, and if the subject that applies it is empowered thereto by the order, this act can be regarded as a function of the order, or, what amounts to the same thing, of the community constituted by it. If blood revenge is considered as a reaction of the group, although only a single individual — perhaps the son of the murdered man — avenges the murder upon the murderer by killing him, it is because the avenger, empowered by the order constituting the group, carries out the act of vengeance in fulfillment of this order. The community constituted by the order acts in the person of the subject empowered by the order. This is a figurative expression meaning that an action is provided by the order, that the acting individual is authorized by the order.

Hence one may say that a state which, authorized by international law, applies against another state which has violated international law the sanction provided by international law — in other words resorts to reprisals or wages war — acts as an organ of the international legal community. Put in another way, it is the international legal community itself that reacts against the violator of the law through the medium of the state resorting to reprisals or waging a just war. If forcible interference in the sphere of interests of a subject is permitted by the order only as a reaction against a delict, then the use of force is

reserved to the community, is a monopoly of the community.

Such a monopoly is possible even when the use of force as a reaction against delicts is not centralized, although the monopoly of the use of force is more effective, and certainly more obvious, when it is united with centralization; and this is the direction of the actual development of the legal order. But law is spoken of as a coercive order involving a monopoly of the use of force even in the stage of decentralization. The permissible use of force is attributed to the community even if it appears as an act of self-help, that is, when he whose right has been injured is himself authorized by the order to react by the use of force against the violator of his right. This attribution is made, however, only if the use of force is permitted by the community solely as a reaction against a delict. Under this condition the measure by which the injured party reacts against the offender is regarded as an act of the community, in which the subject applying the sanction acts as an organ of the community although he is himself the one whose right has been violated. The organ which, according to the principle of the division of labor, is entrusted with the use of force, with the execution of the sanction, is an organ of the community only because and to the extent that it fulfills the order of the community, by performing an act that is required by this order. This alone is the criterion for imputing this act to the community established by the order.

That the individual performing the act of coercion is

functioning according to the principle of the division of labor, that it is a subject distinct from both the injured and the injuring that is entrusted by the legal order with the execution of the measure of coercion, is indeed of great importance from a socio-technical point of view, but is not essential as to the imputation of the act to the community. Even the primitive legal order, or, what amounts to the same thing, the primitive legal community, has organs; but it still has no organs functioning according to the principle of the division of labor, no centralized organs. Even the primitive legal community reacts against violations of its order with measures of coercion against violators of the law; but it still reacts through him who has himself been injured, not yet through centralized organs. By the establishment of such special organs, by centralization of the use of force, the primitive legal community becomes a state. The essential characteristic of this development from a pre-statal to a statal legal community is the centralization of coercive power in addition to its monopolization. Regarded juristically, that is, from a point of view directed to the content of the social order, to the end of analysing its organic structure, the state is nothing but a centralized legal order, or, in other words, a community constituted by a centralized legal order.

2. PRE-STATAL AND SUPER-STATAL LAW

It is just in the degree of this centralization that the legal community of the primitives — the pre-statal legal community — like the international — the super-statal — legal

community, is distinguished from the community we call "state." There is no adequate reason for restricting the concept of law to the coercive order constituting the state, that is, to a relatively centralized coercive order, allowing the law of a state only to count as "law" in the true sense. The different degrees of centralization or decentralization that find expression in the substance of an order are the basis of no such essential difference as to justify distinguishing one coercive order from another as law or non-law solely according to the degree of its centralization. We do not hesitate to speak of law even when the norms of the order in question are created only by custom. So-called customary law — as will be shown later — is nothing but law whose creation is extensively decentralized. It is law created by the joint effort of the subjects of the legal order themselves and not by a central legislative organ. All primitive law is customary law; only, in the primitive stage, in the pre-statal stage of social development, it is not merely the creation of the general norms of the legal order that is decentralized but the application of the legal norms to concrete instances and especially the execution of the sanction. There is a lack not only of a central legislative organ, but of central courts, as well. This is the state of self-help regulated by customary law. The next stage of legal development is characterized by centralization of the application of the law by the establishment of courts. But the difference between an order in which only the application of the law has been centralized without centralization of the creation of the law and

a legal order in which both the application and the creation of the law is decentralized is a difference of degree only. It is the difference between general international law, which provides no courts and no legislative organ, and the legal order of a state which has courts, but has not yet set up a central legislative organ, a legal order whose general norms are created exclusively by custom.

A distinction much more significant than the degree of centralization is the monopolization of the use of force. Between an order that reserves to the community the use of force and one that does not there exists a much greater difference than between two coercive orders both of which monopolize the use of force but one of which is centralized and the other decentralized. If international law can be counted as an order which monopolizes the use of force — and such, as we have seen, is the case — then it is similar to national law in a decisive point. If one refrains from calling international law true law just because it is not centralized to the same degree as national law, not only the creation of its norms but also their application being decentralized, a distinction of technical significance is made but it is not an essential one.

3. THE ELEMENT OF SUPERIORITY AND INFERIORITY IN THE LAW

On the basis of our insight into the structure of international law we must judge the argument that is put forward perhaps the most often and the most successfully against the legal nature of international law. This argu-

ment, formulated differently by different authors yet in its essence always the same, may be put as follows: So-called international law cannot be classed as "law" in the same sense as national law (regarded as law *par excellence*), because an important difference exists between the two systems of norms. This difference lies in the fact that back of national law — true law — stands the state. It is the state that as the highest authority or power superior to its subjects sets up the law for the ordering of the conduct of its subjects. This concept presupposes that the state is not only a normative authority, but is at the same time an effective power, strong enough to enforce the law it has established. In such a supreme authority or sovereign power is seen the specific "political" element. A society in which such an authority or sovereign power exists is called a "political" society, or a state, and in the relationship of the individuals to this authority political superiority and inferiority are seen. Hence, according to this view, law is an order whose sustainer, guarantor, or creator — sometimes the expression "source" is also used — is the state, a political supreme authority or power which constitutes the relationship of superiority and inferiority. So-called international law, however, exhibits no such authority or sovereign power. Back of international law there is no political authority guaranteeing its order, standing above its subjects. Here there is no relationship of political superiority and inferiority. Here all the subjects are themselves sovereign entities and as such are on a footing of equality one with the other. For this reason

so-called international law cannot be classed as "true" law; at best it can be considered only "positive international morality," as Austin,[1] who lent the weight of his great authority to this whole line of reasoning, put it.

This line of argument stands or falls with the statement that international law does not constitute a relationship of superiority and inferiority as does national law, but a relationship of equality. It is therefore necessary to establish the actual meaning of the figurative expression, "superiority and inferiority." What does it mean to say that someone or something in relation to someone or something else is inferior (subordinate) and that the other is superior? In the social sphere it can mean only a specific normative relationship, a relationship that is constituted by the validity of a normative order, of a system of obligating and authorizing norms. That one individual is inferior to another, and hence the latter is superior to the former — and this is what Austin means by "superiority and inferiority" — means that one is obliged by the order to obey the other, and that the latter is authorized by the order to command the former. If we look more closely, it becomes apparent that in this instance the relationship of superiority and inferiority exists really not between the individuals themselves but between the individuals on the one hand and the order regulating their conduct on the other. It is the order that commands one to obey the other; it is the order that one obeys when he carries out the commands of the individual empowered by the order to issue

[1] John Austin, *Lectures on Jurisprudence* (fifth edition, 1885), I, 173.

commands. And the authority of this individual is in the last analysis only the authority of the order, an authority delegated to the individual by the order.

As far as the relationship of individuals among themselves is concerned, they are always on an equal footing, since they are all subject in the same degree to the order superior to them because regulating their mutual conduct. They are all obligated and authorized by the order; if the order is a legal order, they are all legal subjects, irrespective of what the substance of their duties and rights may be. Superiority and inferiority, as must be emphasized again and again, are only figurative expressions. They mean only a normative bond, the relationship of the individual to the normative order.

For the relationship of superiority and inferiority it is a matter of indifference how the norms are created that bind the individuals to certain conduct, whether by custom, by a decree of an assemblage of the people, by an enactment of a parliament, or by the act of an autocrat. These are only different degrees of centralization or decentralization of the process by which the norms are created. In this connection there is no difference between law and morals. Individuals whose conduct is regulated by moral norms are just as much subject to these norms, just as much "inferior" to them, as are those subject to a legal order. For the specific relationship of superiority and inferiority to exist it is not at all necessary for the order to empower a definite individual to create norms or issue commands that others are to obey.

An order whose norms are created by custom, that is, by the combined efforts of all the individuals subject to the order, is an example. If one were to limit to the relations among individuals the relationship of superiority and inferiority, then in a case where the norms were created by custom there would indeed be a relationship of inferiority, since the individuals would have to obey the order, but there would be no relationship of superiority, for no definite individual would be authorized to issue commands or general norms. This is impossible, for inferiority and superiority are correlated. Here the relationship of superiority is the immediate relation of the legal order to the individuals. It is the authority of the legal order that stands "over" the individuals, without there being a definite individual creating the norms, a special organ that represents this authority in a visible fashion. Should no relationship of superiority exist in a state whose law is common law? If it is objected that there is a monarch here, and judges, this means only that not all the norms are created by custom. And then, too, the fact must not be overlooked that the authority of the monarch and the judges in consequence of which alone the others are "inferior" (subordinate) to them and they "superior" to the others is the authority of the legal order which empowers these organs to issue norms, that is to say, commands binding upon the others. Certainly individuals are more clearly aware of the relationship of superiority and inferiority — it is more obvious, more tangible, so to speak — if the norms by which they are bound are created by a

definite person; it is most clear and most tangible if they are created by a single individual, an autocrat; that is, in the case of the greatest centralization of the process of creation of the law. But even in this case, the individuals are not actually subordinated to the individual from whom the norm emanates, but to the order that delegates the authority to this man; not to the lawmaker, but to the law; to the law that the lawmaker issues, and the law on account of which he is a lawmaker: the constitution which has granted him competence to issue laws. *Non sub homine sed sub lege* is the principle not only of a democratic but of any legal order.

If the relationship of superiority and inferiority is understood in this normative sense, then there is no difference between national and international law — if the latter has any validity as a system of norms regulating the mutual relations of states. For if international law obligates states to certain conduct in any manner whatsoever — even if only in the way in which morals obligate individuals — then states are subordinated just as much to international law as individuals are to the national legal order; and just the same relationship of superiority and inferiority exists in the realm of international law as in the realm of national law. In the realm of general international law, which establishes no special organ for the creation of law, this relationship of superiority and inferiority is not so easily apparent. But when two or more states by treaty set up a court to decide upon their disputes, the relationship between this international court and the states in question

is the same relationship of superiority and inferiority as the relationship of a national court to the individuals that are subject to its jurisdiction; the parties to the dispute are obliged by the legal order to carry out the decision of the court, to conduct themselves as the court directs. They are bound by the force of the legal order establishing the court to obey the particular norm issuing from the court. And the fact of being bound by a norm presumed to be valid is the meaning of superiority and inferiority.

4. "POWER" AND LAW

A norm is presumed to be valid only if the system of norms, the order to which this norm belongs, is to a certain degree effective; if the norms of this order are by and large observed. For what reasons the norms are obeyed and applied is of no importance for the question of the validity of the norms. The norms may be obeyed because it is believed that they are an expression of divine will, or because it is desired to avoid the disapprobation of one's fellow men that is associated with failure to observe the norms; or because one fears the act of coercion that the order itself attaches to failure to observe them. As to legal norms especially, such is the case. The efficacy of an order is the "power" which, to express it figuratively, stands back of it. If it be asked what the expression "power" really means in social life, one can only answer that to say one has power over another means that one can induce him to the behavior one desires. In so far as it is a question of power as a social phenomenon, power, social

power, comes into consideration only within the framework of some order regulating human behavior. It is not a question of one man being stronger than the other and hence able effectively to compel him to a certain behavior, as a man masters an animal or fells a tree. For the individual exercising the authority to be regarded as superior presupposes the existence of an order which regulates the mutual conduct of both the individuals who stand in the power relationship, especially when the power is in the hands not exclusively of a single individual, but, as is usually the case in social life, in those of several, of a group of men. Social power is always organized one way or another even if quite crudely. At any rate so-called political power, the power of the state, is such organized power.

If one speaks of the power of the state one probably thinks first of prisons and the electric chair, guns and cannon, and if one is a believer in the materialistic interpretation of history, of the bank accounts of the employers and of their factories. One should not forget, however, that all these are dead things which, in order to be instruments of power, must be put to use by men; and men put these instruments to use for one purpose or another only if they are instigated to do so by other individuals through commands, that is, through norms. The phenomenon of power appears here in that these commands are obeyed, and in that the norms regulating the use of prisons and electric chairs, guns and cannon, bank accounts and factories are efficacious. Power is not prisons and electric

chairs, guns and cannon, bank accounts and factories; power is not a substance, not a thing distinct from the social order, hidden somewhere back of it. Social power is only the efficacy of an order regulating the mutual conduct of individuals. This may be, but need not necessarily be, a legal order. If the relationship of superiority essential to law is power, then this power is only the effectiveness of the norms establishing the coercive measures. "Superiority," says Austin,[2] "signifies might, the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes." Austin can assert nothing about the essence of the power which constitutes the relationship of superiority except the efficacy of the command. It is not always the strongest power which, figuratively, stands behind the legal order. The power behind a moral or religious order is often much greater; that is to say, the moral and the religious ordering of human behavior are often more effective than the legal ordering.

What is the basis of the efficacy of a social order, the motives for the obedience accorded it, the secret of power, is sociologically a very significant problem. Whether we can solve it scientifically today, whether we shall ever be able completely to solve it, is doubtful. But it lies outside the field of the question of the nature of law. In this connection the statement already made suffices: the coercive order which is called law must have a minimum of efficacy for its norms to be regarded as valid; and the asser-

[2] *Op. cit.*, I, 96.

tion that back of the legal order is a power means only that the legal order is by and large efficacious, that its norms are actually observed. But this is true of every social order. Back of every social order that we regard as valid is power.

But, one will object, it is the essential characteristic of law that the power back of it is the state. This answer is misleading, for the state itself is nothing but an order, an organized power, so to speak; and that means an effective order. As a power, the state is the effectiveness of the legal order, and as an order (or, which amounts to the same thing, as an organization), it is this legal order itself. The state as a power back of the law, as sustainer, creator, or source of the law — all these expressions are only verbal doublings of the law as the object of cognition, those typical doublings toward which our thinking and our language incline, such as the animistic presentations according to which "souls" inhabit things; dryads, trees; nymphs, springs; or, to give an example not only from the thinking of the primitives but also from that of civilized peoples, the concept of force in modern physics.

5. THE DUALISM OF STATE AND LAW

The dualism of state and law, the idea that the state is an entity distinct from its legal order even though connected somehow with this legal order, is especially favored by the fact that it seems quite possible to subsume the idea of the state under a general concept other than law.[3] The

[3] Cf. my *Allgemeine Staatslehre* (1925), pp. 71 sq.

latter is an order, a system of norms which regulate the conduct of individuals. The former, on the other hand, is a social entity, a number of individuals, a group or a community. One usually defines the state as a group or community of individuals that are under a definite ruling authority; that is, an authority that establishes a definite order and is powerful enough to assure obedience to this order. But there is general agreement that the state is not identical with the individuals which are said to comprise it or belong to it. If the state were a mass of individuals one could see and hear the state — in short, sense it, as one senses individuals. But the state, as most theorists will agree, is not an entity capable of being perceived by the senses. Hence it cannot be correct to define it as "many individuals." It cannot be right for the additional reason that the individuals who are said to comprise the state or belong to it by no means belong to it completely, in all phases of their being, like the cells of a physical organism. Individuals can belong not only to the state, but also to other communities that have nothing to do with the state. More important yet, the individual belongs to the state only in very definite spheres of his activity; in all other directions he is free from the state. The state, it is true, claims to regulate every possible relationship of the individual to other individuals, claims to set up complete domination over the individuals subject to it. That is to say, it is of the nature of the coercive order that we regard as a legal order to intend in principle to regulate all human relations, and according to this tendency to lay

claim to totalitarianism. In other words, it is regarded as competent in principle to regulate the behavior of the individuals subject to it in every possible sphere of their activity. Herein, too, the legal order of the state can be distinguished from other orders which relate only to limited objects, which purport to regulate only certain human relationships. This may be expressed by saying that the competence of the state is in principle unlimited. This principle, however, has an exception, a single exception: international law limits the competence of the state.

This claim to totalitarianism inherent in the nature of the state may be realized in social actuality to very different degrees. The state can make more or less use of its competence vis-à-vis the individual. Accordingly, the sphere of the freedom of the individual from the state may be now restricted, now extensive. But the state's claim to totalitarianism can never be completely attained at the expense of the individual; there will always be some expressions of the individual that the state cannot lay hold of. A remnant of individual freedom, if it be only inner freedom of thought, is inalienable under any social organization. The state, no matter how totalitarian, cannot take complete possession of the whole individual. The state is not the individuals — not the individuals that belong to the state with some parts only of their beings. The state can be only an order which regulates the mutual conduct of individuals while obligating them to a perfectly definite behavior. The state touches the individual only to the extent that the order of the state prescribes a

definite conduct for individuals. To the extent that it does not do this, the individual is free from the state, because to that extent he is not subject to the state. To understand the nature of the state as it reveals itself in its relation to individuals, bearing in mind the fundamental consideration that the state can never completely absorb the individual, the state must be conceived of as an order. It is not a number of individuals living under an order regulating their conduct, it is the order itself that regulates the conduct of these individuals. And these individuals comprise a group, a community, only to the extent that their mutual conduct is regulated by an order. Without this order they are a chaotic, structureless mass.

As the community consists only in this ordering, the value of a distinction between the social order and the social community is very problematical. To say that the order constitutes the community is a doubling even from a linguistic point of view, and is admissible only if one bears in mind that the order and the community are not two different things but two different aspects of the same thing. The word "community" expresses unity in plurality, a unity which is possible only through ordering. To say that the state is a community of individuals and that the state is an order regulating the mutual conduct of individuals amounts to the same thing. If the state is an ordering of the mutual conduct of the individuals belonging to it, forming it, it can only be the legal order; the same legal order of which one says that it is created, sustained, or guaranteed by the state. The figurative characterizations of the state as "creator," "sustainer" or "source"

of the law can only mean that individuals who are regarded as organs of the state create the law. But these individuals can be regarded as organs of the state only if they are authorized to function thus by the very order which they create. To say that the state guarantees the law, that it "executes" it, that it "enforces" it, means in turn only that specified individuals representing the state carry out the measures of coercion specified in the legal order against other individuals under perfectly definite conditions. And these individuals represent the state only because and to the extent that they are designated to do so by the legal order. Again and again the "state" that is sought back of the legal order proves to be the legal order itself, just as God, who is sought behind nature — regarded scientifically, not metaphysically — can be conceived of only as this very nature itself. And just as God, as a person — from the point of view of rational cognition, not of religious metaphysics — is only a personification of nature, the anthropomorphic expression of its unity, so the state, as a person, is only the anthropomorphic personification of the unity of a legal order. These are by no means the only parallels that exist between the concept of God and of the state. The concept of the state is a typical product of political theology.

6. THE IMPUTATION OF ACTS TO THE STATE

One can also convince oneself quite empirically and in a comparatively simple fashion that the state is, as an order, actually only the legal order; as a person, only the

personification of this order; as a power, only the efficacy of this order. For how does the state, in itself invisible and intangible, manifest itself in actual social life? It manifests itself in the acts of individuals which are regarded as acts of the state. Not every individual can perform an act of the state; and not every act of an individual capable of performing an act of the state is such an act. What then is the criterion? Wherein can human activities characterized as acts of state be distinguished from human activities that are not acts of state? This is the critical question that leads to the nature of the state. It is the question of the criterion of imputation of acts to the state. The state is the common point of imputation for certain acts of individuals. Such imputation is only possible, however, if a valid order is presupposed, one which regulates human behavior in a specific way. The imputation of an act of an individual to the state, the characterization of an individual's act as an act of the state, occurs if this act conforms in a definite way to the order which has been assumed to be valid. The imputation of an act to the state is only referring something to the unity of the order determining it. To say that the state punishes the criminal, although actually it is always individuals that perform these acts called punishment of a criminal, is only to express figuratively the fact that provision is made for punishment of a criminal in a norm of the legal order, that the phenomenon characterized as an act of the state is an execution of the legal order. To regard the state, a point of imputation, as a person who acts,

is only to personify the unity of the order that is presupposed as valid when certain acts of individuals are distinguished as acts of the state, when they are called acts of state. But the validity of such an order is presupposed, such an order is used as a scheme of interpretation, only if this order is sufficiently effective, if the conduct of individuals actually conforms to it to a certain extent. This is, juristically described, the power of the state.

7. THE STATE AS A CENTRALIZED LEGAL ORDER

It is a fact of experience that a coercive order, such as the legal order, gains in efficacy if it establishes for its execution special organs functioning according to the principle of division of labor, that is to say, if the application of the legal order is centralized. Not every legal order is a state. We speak of a state only when the legal order has attained a certain degree of centralization. When Austin and his followers say that international law is not law because law is an order back of which is the state, or one which the state creates, sustains, guarantees, etc., they mean — to formulate the idea stripped of all personification and figurative language — that the international legal order is not sufficiently centralized to be called law. And this statement assumes that the idea of law is identified with a relatively centralized coercive order. Why such an assumption implies an inadmissible or at least purposeless narrowing of the concept of law has already been explained.

8. SOVEREIGNTY

Austin and his followers seek to separate international law from national law also by characterizing as "sovereign" the power in which they think they are able to see the sustainer, the source, or the guarantor of the law. Whatever may be understood by this word of many meanings, "sovereignty," and however much the different definitions of this concept may differ from each other, most of them agree on one point: the thing called "sovereign," whether it be an order, a community, an organ, or a power, must be regarded as the highest, above which there can be no higher authority limiting the function of the sovereign entity, binding the sovereign. And we can hardly find any other sensible expression for the term than "the highest authority." That the authority assumed to be sovereign is called "independent" is only the negative aspect of its characteristic of being the highest. The question of whether or not the state or the legal order of the state is sovereign cannot, as one usually thinks, be put and answered in the same sense as the question of whether a physical thing, a chemical element, for instance, has a certain characteristic. For the state is not an object of nature, not a natural being, but, as the subject of sovereignty, a normative order. The query whether the state is sovereign means rather whether we conceive the order of the state to be an order of the highest rank. From the standpoint of a radically individualistic philosophy of values, the personality of the individual is the highest

authority, that is to say, it is conceived to be such from the point of view of this philosophy. From the point of view of a universalistic philosophy, it is not conceived to be such, since other, higher authorities are conceived — the nation, for instance, or humanity. In these matters it is a question of the ranking order of aims or values, of judgments of value, which, in the last analysis, are subjective in character. The state is sovereign if we conceive it to be sovereign, if we conceive the order of the state to be the highest. It is not sovereign if we proceed from a different assumption. The dispute about the sovereignty of the state is, so far as it is purely theoretical in character, a dispute about preconceived ideas regarding the position of the state in the world of values, i.e., in a system of norms.

In the world of physical reality, there is no such thing as sovereignty. There it would have to mean omnipotence or *prima causa*; both of which are meanings which the concept of sovereignty actually assumes when it is used as a characteristic of God, not only in the realm of values — that is, in the sense of the supreme authority — but also in the world of physical reality, when God is asserted to be not only a moral person but also a natural (or supernatural) reality. It goes without saying that sovereignty in this sense has no place in the realm of science.

9. NEGATION OF INTERNATIONAL LAW AS A CONSEQUENCE OF THE DOGMA OF SOVEREIGNTY

If one assumes, as do Austin and his school, that the state, as the sustainer or source of its law, is sovereign, or, more correctly, if one assumes that the national order is

the highest possible order, then no order can be conceived to exist above the state or the legal order of the state such that it can obligate the state or the individuals representing it. If this is the case, the presentation of the situation as made by Austin and his pupils is not true: that international law is so different from national law that it cannot be called law in the strict sense of the term. It is true, rather, that there cannot be any international law binding upon the state in any way as a system of valid norms regulating the mutual conduct of states. For if there were such an order, it would necessarily be "superior" to the state, superior to the individuals representing the state, superior to the very organ which according to Austin must be sovereign if a legal order is to exist, superior to the monarch or whatever else is the highest organ in the state. The relationship of superiority and inferiority is only a figurative way of expressing the relation of normative bonds, the relation of a subject to the norm regulating his behavior. The existence of any normative order regulating the mutual conduct of states is incompatible with the sovereignty of the state, or with that of the organs which represent the state in its relations to other states, even if this order has, as Austin thinks, only the character of a "positive morality."

10. SUPERIORITY AND INFERIORITY IN INTERNATIONAL LAW

If, however, international law is assumed to be a system of binding norms regulating the mutual behavior of states, that is, of the individuals who represent the states, then the state cannot be assumed to be sovereign; and sover-

eignty can be no essential element in the relationship of superiority and inferiority, which, according to Austin and his school, is the distinguishing mark of national law. But then the very same relation of superiority and inferiority exists in international law as in national law; just as single individuals are, here, subjected to an order, an authority regulating their mutual conduct, so are states, there; and the authority to which the states are subjected in international law is really sovereign. For no jurist, at least no representative of a jurisprudence that is directed only to positive law, assumes that there is in force above international law a still higher normative order that regulates the conduct of the same subjects as the international and the national legal orders. If instead of viewing the relationship of superiority and inferiority in relation to a normative authority, it is assumed that the relationship in question is constituted by a power, then the same power is to be found in international law which in national law is called the power of the state and which, as has been shown, is only the efficacy of the national legal order. One can say of international law just what Austin says of the relationship of superiority typical of national law: "Superiority signifies might, the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes." For international law, like national law, is an order which seeks to bring about the desired conduct by attaching to contrary behavior measures of coercion which are regarded as evils by the

person subjected to them. And international law, which also threatens such measures of coercion, has a certain efficacy; the norms of international law are observed in a certain measure, to the extent that the states — that is to say, the individuals representing them — wish to avoid the evils prescribed by international law in case it should be violated. If this were not so, if the norms of international law had no efficacy, one could not speak of valid international law at all; it would not be possible to conceive the existence of international law as a system of valid norms. But if one can so speak, one can likewise say that "back of" international law is a power, that international law is sustained or guaranteed by a power. And if it is the "state" that is back of the national legal order, if it is the state that is thought of as the sustainer or guarantor of this legal order, the state which is the community constituted by the national legal order, then back of international law is the international legal community constituted by this order just as the state stands behind "its" law. And this international legal community can be called the sustainer, guarantor, source of international law in just the same sense as the state can be called the sustainer, guarantor, or source of national law. We must never forget that these are all only figurative expressions, personifications, that have no independent meaning. If we resolve them, the dualism of law and state disappears and it is no longer possible to deny to international law the character of law on the ground that back of international law there is no international state.

LECTURE IV

THE TECHNIQUE OF INTERNATIONAL LAW

I. THE DIFFERENCE BETWEEN INTERNATIONAL LAW AND NATIONAL LAW

MY ANALYSIS of international law has shown that the norms called by this name can actually be regarded as law in the same sense as the norms of national law. But how are these two sorts of legal norms distinguished?

The traditional theory answers this question by saying that international law is distinguished from national law by the objects regulated: international law regulates the relations between states, that is, the mutual conduct of states; national law regulates the relations of individuals, that is, the mutual conduct of men within the states. This is also expressed by saying that the subjects of international law are states and only states, while the subjects of national law are men. The state is conceived of as having existence in space, and, accordingly, events are distinguished as happening within the state and without the state. We speak of internal and external affairs of the state. The object of national law is *within* the state; the object of international law is *without* the state, or, in other words, national law regulates internal and international law external affairs.

But the assertion that international law and national law regulate the conduct of different subjects will not withstand a critical test. The state, which represents the specific subject of international law, is, insofar as its behavior is the substance of rights and duties, a being no different from individuals, the specific subjects of national law. Only individuals can have rights and duties, for the substance of rights and duties can only be the behavior of individuals. The fact that international law obligates and authorizes states does not mean that it does not obligate and authorize individuals, but only that it obligates and authorizes individuals whose acts are interpreted as the acts of a state. As will be shown later, the fact that states are the subjects of international law means that international law obligates and authorizes individuals in a special way, a different way from that in which national law does. Thus international law and national law do not regulate the behavior of different, but of the same, subjects; both regulate the behavior of individuals. It is the technique of the regulation that is different.

Just as untenable as the assertion that international law and national law have different subjects is the idea that national law regulates relations having their seat within the state whereas international law regulates relations lying without the state. The idea of the state as a body in space having an "inside" and "outside" is only a picture. If one resolves it and tries to present the condition of affairs without resort to figurative expression it is evident that the assumed difference does not exist at all. An example will

make this clear. To the so-called internal affairs of the state belong, doubtless, the relation between employers and employees, and the acquisition and loss of citizenship. These affairs are, as a matter of fact, usually regulated only by norms of national law. If, however, two states conclude an international treaty by which they are obligated to regulate in a certain manner the relations between employers and employees, or the acquisition and loss of citizenship — and there are many such international treaties — these "internal" affairs become "external." It is not that national law regulates certain affairs because they are "internal" affairs of the state and international law regulates certain affairs because they are "external" affairs; it is just the reverse: certain affairs are internal affairs of the state because and insofar as they are regulated by national law; and certain other affairs are external affairs because and insofar as they are regulated by international law.

Nevertheless, it is possible to characterize international law, in distinction to national law, as a law "between states," an "inter-statal law." The distinction is not made, however, with regard to the subject of the regulation, but with regard to the method of the law's creation. International law is law created by the collaboration of two or more states. This is true as well for law created by international custom as for law created by international treaties. National law, on the other hand, is law that is created by the "will" or by the organs of one state. The method of creation is one element of the technique of the law. Hence, the assertion that international law regulates the

external and national law the internal affairs really means only a difference between the technique of international law and that of national law.

But the circumstance that national law is created by the organ of a single state whereas international law is created by the collaboration of two or more states furnishes a relative rather than an absolute criterion for distinguishing the two systems of norms. For it can happen that by means of international law, that is to say, by the collaboration of two or more states, a law is created which is then regarded as national law; for example, the origin of a federal state by the merger of states previously independent. Regarded from the juristic point of view, this circumstance consists in the fact that several states establish through the medium of a treaty the constitution of a federal state to which the treaty-making states belong as mere member states. The constitution of the federal state so established is the substance of the international treaty. It is at the same time the basis of the law of the new state, and, as such, national law. In the same way — that is, by treaty — a mere confederacy of states can come into being. But if the constitution which forms the substance of the treaty is the constitution of a confederacy of states rather than of a federal state, this constitution is then regarded not as national law but as international law. Where is the difference? The method by which the law is created is in both instances the same, but the substance of the order created by the treaty is different. And the difference is that the community called a federal state exhibits a much higher

degree of centralization than the community in which only a confederation of states is recognized. According to the degree of centralization exhibited by an order created by a treaty, this order has the character of national or international law. Hence it is the specific technique of international law which distinguishes it from national law. The essential elements of this technique will be explained below.

2. INDIRECT OBLIGATING AND AUTHORIZING IN INTERNATIONAL LAW

(a) *Only states subjects of international law?*

As has already been remarked, the traditional theory maintains that international law is distinguishable from national law by the objects it regulates. International law regulates the behavior of states: it imposes duties and confers rights only upon states, whereas national law regulates the behavior of individuals, in that it imposes duties and confers rights upon individuals. But the fact that international law, in distinction to national law, obligates and authorizes states does not mean that international law does not obligate and authorize individuals. The principle that only states are subjects of international law — fundamental principle of the doctrine of international law — means only that international law obligates and authorizes individuals in a special way, in a different way from that in which national law does the same thing.

To understand the difference that exists on this point between the technique of international law and that of

national law, the following must be borne in mind. Legal norms obligate and authorize individuals in that they regulate the behavior of individuals, lay down certain behavior of individuals as conditions or consequences. Only the behavior of human beings can be the substance of legal norms, the object of duties and rights. A legal norm which does not regulate human behavior has no substance at all; it cannot establish any duty or right.

In the human behavior that constitutes the substance of a legal norm, or, in other words, that is determined by a legal norm, two elements can be distinguished, one personal and one material. It is a definite individual that is to conduct himself in a definite way. The legal norm specifies who is to do something or refrain from doing it, and it specifies what is to be done or not done. In general, the norms of international law specify only the material element, not, as do the norms of national law, the personal element as well. International law leaves the determination of the personal element to the national legal orders. To say that international law obligates and authorizes only states means that international law specifies only *what* the states are obligated or authorized to do or refrain from doing. The designation of the individual who is to carry out the act prescribed by international law is left by international law to the legal order of the state whose right or duty is laid down. Examples may explain what has just been said. General international law obligates a state that wishes to resort to war to make a formal declaration of war before the beginning of hostilities, but it does not

specify what individual, as organ of the state, is to make this declaration of war. That is done by the legal order of the state itself. As a matter of fact, the constitutions of states contain a provision empowering a specific organ to declare war, when war is to be resorted to. It is usually the head of state to whom the constitution grants this competence. But it may be another organ. The constitution of the United States provides in Article I, Section 8, "The Congress shall have power to declare war."

Another example: International law empowers the states to regulate their mutual relations — insofar as these are not regulated by general international law — by treaties. But international law does not specify what individual has the power, as organ of the state, to conclude an international treaty with the organ of another state. International law leaves the designation of this individual, the designation of the organ competent to conclude treaties, to the legal order of the state. The constitutions of states actually contain such provisions. It is usually the heads of state that are authorized by the constitution to conclude treaties. Mostly, however, this competence is not accorded to the head of state exclusively. Very often he is bound, in the matter of the conclusion of treaties, by the necessity of the collaboration of other organs, of ministers responsible to the legislature, or of the legislature itself. The constitution of the United States empowers the President to make treaties, but only with the advice and consent of the Senate.

From these examples it is apparent that international

law does regulate human behavior. But it determines immediately only the material, not the personal, element of this behavior. The norms of international law are not complete norms; to be applied at all they need to be supplemented. This supplementation consists in the designation of the personal element, which is effected by the national legal order. The existence of such national legal orders is presupposed by the international legal order. Only in conjunction with the national legal orders does international law form a significant whole. International law does obligate and authorize individuals, but it does so not as national law does, immediately, but mediately, through the medium of the national legal order. It is this national legal order that designates the individuals whose conduct forms the substance of the rights and duties of states, as provided by international law. And these individuals are organs of the state because and to the extent that they are designated by the national legal order. The real meaning of the statement that states and only states are subjects of international law is that international law designates only indirectly the individuals who as organs of the state must fulfill its international duties, must pursue its international rights. That is the specific technique of international law, which is expressed by saying that international law obligates and authorizes states and only states.

(b) *Individuals as subjects of international law*

This statement, however, expresses a rule that is not without exceptions. Direct obligating and authorizing of individuals is by no means excluded in principle. As a matter of fact, there are both norms of general customary international law and norms of particular treaty law in which individuals are directly obligated and authorized. There are norms of international law in which the individual is directly designated whose conduct forms the substance of the right or duty set up by international law. There are instances in which international law does not leave to national law the designation of the personal element, but itself deals with it. These norms of international law are complete norms, requiring no supplementing.

An example of such a norm is the provision of general international law by which piracy is forbidden. The prohibition works in this wise: all states, or more accurately, the commanders of the vessels of all states, are authorized to proceed with specific acts of coercion against individuals who are guilty of piracy. Piracy is completely provided for by general international law, in regard to the personal as well as the material element. It is by general international law that individuals are directly obligated to refrain from piracy. That it is not the state, as such, which is under obligation in such cases appears also from the fact that the sanction whereby the obligation is constituted is not one of the sanctions provided for by general international law — reprisal or war. Reprisal and war are

directed against the state as such, that is, as will be seen later, against all the individuals belonging to the state, and not against specified individuals — persons individually specified by international law. If an individual is to be obligated to a certain behavior directly by international law, sanctions must take effect which are directed not against the state as such, but against certain definite individuals, the individuals that have violated the duty set up by international law. The specification of these sanctions international law leaves to national legal orders; as, for instance, the sanctions to which recourse is to be had against pirates. That these sanctions are not directed against the state to which the pirate belongs means that the person who is bound by international law to abstain from piracy is specified by the very norm of international law by which the act of piracy is directly determined. It means also that the sanction is not reprisal or war, but an individual coercive measure, directed exclusively against the perpetrator.

Now, let us look at some examples of a direct authorization of individuals by international law. It is the view of many an international law teacher that the head of a state is competent, according to general international law, to conclude an international treaty without regard to what the constitution of the states provides on this point. If such a legal norm of general international law actually exists — which I doubt — then general international law would directly empower certain individuals, namely heads of state, to conclude treaties. There is also a direct authori-

zation of individuals — that is to say, international law confers rights directly upon individuals — when states conclude a treaty by which an international court is set up for the decision of certain disputes and the treaty contains a stipulation that the international court can be resorted to by specified private persons. In such a case, these private persons are accorded the position of subjects of international law directly by international law. Normally, however, such is not the case. If an international court is to decide upon interests of private persons, the latter are usually not authorized to resort to the court and present their claims before it. It is the state to which these persons belong that is conceived of as the claimant (or defendant) by the treaty establishing the court. The state, or rather the organ representing the state, presents before the court the interests of its nationals. Only through their state, that is, through the mediation of the proper state organ, can private persons present their interests before the international court. In such a case, not the individual, but his state, is accorded a right by international law, is the subject of the right accorded by international law. International law has left it to the national legal order to stipulate which individual — as organ of the state — is to apply to the court (or to appear before the court as defendant).

(c) *Transformation of international into national law*

If international law obligates states, not individuals, to certain behavior — that is, if international law leaves to the national legal order the determination of the indi-

viduals whose conduct constitutes the substance of the duty — two cases must be distinguished. So far it has been assumed that at the moment the international duty of the state becomes actual the constitution of this state already contains the designation of the organs which are to fulfill the international duty. But it is also possible that the legal order of the state does not yet contain a norm by which the individual is designated who, as organ of the state, is to perform the international duty. In this case, such a norm must be enacted. The situation is the same if the norm of international law obligates the state to some conduct but designates this conduct only quite generally, so that further stipulations are necessary to carry out this norm of international law. In this case, a national norm must be enacted to amplify the norm of international law, for the conduct of the organs that must fulfill the international duties of a state must be adequately determined.

A norm of national law for the execution of a norm of international law must also be enacted when the organs of the state that must fulfill its international duties can, according to the constitution of the state, execute only norms of national law. This applies especially to courts and administrative authorities. These are usually not authorized to apply directly norms of international law, especially international treaties, even when the norm of international law is technically complete, and hence — regarded from a technical point of view — could be applied directly.

Such a direct application of a norm of international law

by the courts and the administrative authorities of a state is precluded when these organs are instructed to apply only norms created exclusively by organs of their own state, that is, customary law originating within the state, statutes enacted by the legislature of the state, regulations of the administrative organs, etc. In such a case, it is necessary to clothe the content of the treaty in the form of a norm of national law, perhaps in the form of a statute enacted by the legislative body, to enable it to be carried out. This procedure is called — not very aptly — "transformation" of international law into national law.

It is not, as many theorists believe, necessary under all circumstances. The direct application by the courts and administrative authorities of a state of norms of international law, especially of treaties, is possible, if the constitution of the state does not forbid it. Nor is it to the point to establish the necessity of the so-called transformation by the assertion that international law can obligate only the state as such, not its organs and subjects. If the transformation of a treaty into national law is necessary from the point of view of positive law, this means that the treaty obligates the state to enact, by the constitutionally competent organ, a norm of national law whose subject matter shall correspond to that of the treaty. And this means, as has been seen, that international law obligates the state organ in question, not indeed directly, but indirectly, through the medium of the legal order of the state, that specifies which organ is competent to create the required norm. The norm created by this organ obligates

other organs and subjects of the state to behavior that corresponds to the treaty thus "transformed." They are indeed obligated directly by national law, but they are obligated indirectly by international law.

Let an example illustrate what has been said. Several states conclude a treaty by which the question of prohibition is regulated. The treaty contains detailed provisions concerning the manufacture and sale of alcoholic beverages. The subject matter of the treaty may be so formulated that a direct application of the norms created in the treaty by the courts and administrative authorities of the treaty states is technically possible. But the courts and administrative authorities of one of the treaty states are, according to the constitution of this state, not in a position to apply an international treaty directly. Here a so-called transformation of the treaty into a statute is necessary. Only in the presence of such a law, reproducing the substance of the treaty, are the courts and administrative authorities obligated to apply the norms regarding the manufacture and sale of alcoholic beverages, and the subjects of the state — the manufacturers and dealers — obligated to observe these norms. These are duties laid down directly by the national legal order; duties laid down indirectly by the international law order, that is by the treaty regarding the manufacture and sale of alcoholic beverages. If "transformation" of an international treaty into national law is necessary, then the treaty obligates the state to enact a law whose content is determined by the treaty. Of this treaty it cannot be said that it obligates

only the state as such, and not its organs or subjects. It obligates those organs of the state which according to the constitution are competent to create such a law, the government that must propose such a bill, the legislature that must enact the statute. But these organs are only indirectly obligated by international law if international law leaves to the national legal order the designation of these organs.[1]

From what has been said it is apparent that the direct obligating of individuals by international law — in both the senses presented here — is possible, just as is the direct authorization of individuals by international law. But such direct obligating and authorizing of individuals by international law seldom occur today, in view of the present condition of international law and of national legal orders. As the direct obligating and authorizing of individuals by international law increases, the border between international law and national law tends to disappear.

3. COLLECTIVE RESPONSIBILITY

The principle that international law, in distinction to national law, obligates states means not only that the individual whose behavior forms the subject matter of the international norm is not directly designated by international law. The principle applies not only to the individuals whose behavior forms the substance of the international right or duty, but also to the individual or

[1] Cf. my article, "La Transformation du droit international en droit interne," *Revue générale de droit international public*, XLIII (1936), 529.

individuals against whom the sanction provided by international law is directed. In the first lecture, it was shown what it actually means for one to be legally obligated to certain behavior. One is legally obligated to certain behavior if contrary behavior is the condition of a sanction provided by the legal order. The specific sanction of the law is a measure of coercion — depriving one forcibly of life, health, freedom, or property.

Against whom is this sanction directed? Whose life, health, freedom, or property is to be forcibly taken away? By the answer to this question the technically primitive legal order is distinguished from the technically developed legal order. With a more refined sense of justice we find the sanction directed against only those whose behavior constitutes the legal duty and whose undutiful behavior therefore constitutes the delict as the condition of the sanction. If a legal order forbids murder, that is to say, if it provides a punishment for committing murder, then the punishment is to be directed against the murderer and only the murderer. If the individual against whom the sanction is directed is the one who is responsible for the delict, then the requirement of the more refined legal technique runs as follows: only he who commits the delict, only the delinquent, is to be responsible for the crime. As was pointed out in the first lecture, this is the principle of individual responsibility.

Primitive legal orders, however, do not meet this requirement. It is not contrary to the primitive sense of justice for the sanction to be directed against not only the mur-

derer himself, but his relatives as well, all those belonging to his family or his tribe; in other words, against the members of the circumscribed group to which he belongs. Not only he who actually committed the delict is responsible, but others as well. The circle of those responsible is defined by the fact that they belong to a definite social group, to the same legal community. This is the principle of collective responsibility.

This principle may hark back to the fact that, according to primitive conception, a very close bond exists between an individual and the other members of his group, that the individual is identified with his group, with all the other members of it. Primitive man does not regard himself as a self-sufficient individual, distinct from and independent of his group, but rather as an integral part of it. For him it is a matter of course that each member of the group is responsible for every other member. Just as a heroic deed of one member of the group calls forth satisfaction and pride from all the others, so it is also deemed just that a delict of one member of the group should be avenged on all its members. Collective responsibility is a typical element of the state of justice in which the principle of self-help still subsists. Blood revenge, that typical form of self-help, is directed not only against the individual who has committed the deed to be avenged, but against his whole family. It is the reaction of one group against another group.

It is precisely this principle which characterizes the technique of international law. One does indeed say that the

sanctions of international law — reprisals and war — may be directed only against the state that has committed the wrong, and against no other. And this presentation of the situation gives the impression that the principle of individual responsibility exists in international law, too. However, if one resolves the anthropomorphic personification that is being used in conceiving of the state as a personality capable of action, it is at once apparent that it is the primitive principle of collective responsibility that controls here. Both sanctions of international law consist — just as do those of national law — of a forcible deprivation of life, health, freedom, or property. These can only be the life, health, freedom or property of individuals. But the individuals that are sacrificed to reprisals or to war are not necessarily the same as those that committed the international delict; as a matter of fact, they are almost never the same. An international delict can be committed only by those individuals whose duty it is to fulfill the international obligations of a state; these are certain organs of the state, ordinarily the executive. The international sanctions are not directed against these men only, however. If the envoy of one state is killed within the territory of another, and if the government of the latter state refuses to punish the murderers and to give other satisfaction — (the delict consists in this refusal) — and if the state whose envoy was killed resorts to war against the other state, all this means that men are killed, made cripples, taken prisoner, divested of their property — men who had absolutely nothing to do with the murder, men who could

neither have prevented it nor punished the perpetrators of it.

The extent of the circle embracing the individuals constituting the objects of the measures of coercion that represent international sanctions is limited only in that the individuals must belong to the state, that is, must be subject to the legal order of the state that is responsible for the delict. They are in general those individuals living within the territory of this state. The situation presents the typical elements of collective responsibility. For the international delict of a state, that is, for certain behavior of perfectly definite individuals, which according to international and certain national law is attributed to a certain state, all the individuals belonging to this state are in principle responsible, irrespective of what individuals actually committed the delict. If one says that the international sanctions, reprisals and war, are directed against the state "as such" this means that it is not directed against men individually determined, but against men only collectively determined.

Hence, to say that international law obligates states means, first, that it determines only indirectly — that is, through the medium of the national legal order, the individuals whose behavior constitutes the substance of the duty set up by international law; and, second, that the specific sanctions by which the international duty is constituted — reprisals and war — are directed against men determined not individually but collectively.

In the second instance, there is manifested the technique

of international law in regard to the solution of the problem of liability. It corresponds to the actual sense of justice of the men involved. They do not consider it unjust to suffer for a deed that others have committed, as long as they belong to the same community as the delinquent. And, usually, the citizens of a state do identify themselves — to a greater or lesser extent — with their government so far as its relations to other governments are concerned. This is in no small part the basis of the phenomenon of nationalism.

4. ABSOLUTE LIABILITY

Very closely connected with the difference between individual and collective responsibility is another distinction, which also concerns the solution of the problem of responsibility. To be responsible for a socially harmful or socially useful result, it is not sufficient, according to modern ethical views, for the result to have actually been brought about by one's own conduct. The result must have been brought about in a definite manner. If an individual is to be made responsible for a result brought about by him, he must have intended this result, or — if it is a question of socially harmful conduct — he must at least have conducted himself negligently. If one is felling a tree and the falling trunk kills someone, who, despite warning, has approached too close, the person who felled the tree is not responsible for the death of the other. This is the so-called principle of responsibility based on fault. In the technique of the law, this principle is realized by charac-

terizing conduct as a delict — that is, as the condition of a sanction — only if the result of the conduct was intended or was brought about through negligence. This principle is unknown to primitive legal orders, where the principle of so-called absolute liability prevails. Whoever brings about, no matter how, a result designated by the legal order as socially hurtful, is punishable. Where the principle of collective responsibility exists, this is almost unavoidable, for here the sanction is directed to include individuals who have not themselves brought about the result, but who merely belong to the same social community as the individual who by his behavior did bring about the result.

In this respect, too, international law appears as a primitive legal order. Neither intent nor negligence forms an essential element of the delict of international law. The question of whether reprisals may be resorted to or war waged against a state is independent of the question of whether the individuals who, as organs of the state, committed the international delict acted with evil intent or negligently. This technique of absolute liability, liability even without fault, is connected with that of collective responsibility, and this in turn with the fact that international law obligates only states; that is, with a technique which obligates individuals only indirectly. To the extent that international law tends to obligate individuals directly, it is also compelled to take over the principles of individual responsibility and responsibility based on fault. To the same extent, however, the distinction between international and national law tends to disappear.

5. DIFFERENTIATION OF THE SANCTION

A very significant difference between the technique of international law and that of national law concerns the form of the sanction. The coercive act representing the sanction of national law appears — as has already been mentioned — in two different fundamental forms: as punishment and as civil execution. Both acts are the forcible taking away of possessions. Civil execution, the forcible taking away of property; the fine, a punishment, too, is this. The difference between the two lies, as has already been shown in the first lecture, not in the external circumstance but in the purpose pursued. In the case of civil execution, the forcible taking away of property is for the purpose of compensating for the illegally caused damage. The property forcibly taken from the defendant is used to satisfy the plaintiff. In the case of a fine, the property forcibly taken from the condemned is not used for the satisfaction of the requirements of a private person; it is assimilated to public funds. The purpose of the fine, like that of punishment involving death or imprisonment, is prevention. Civil execution, also, has a preventive effect, but it is not on account of this effect that it is provided. Thus the difference between punishment and civil execution is not very sharp, but the differentiation between penal and civil law rests on this difference between the two sanctions.

A very characteristic mark of the sanction of national law consists in the fact that the seriousness of the delict bears a direct relation to the severity of the sanction at-

tached to it. The more serious the delict — the more detrimental to the community in the eyes of the lawmakers — the greater is the evil that overtakes the delinquent in the form of a sanction. This principle holds chiefly for criminal law. Serious crimes, such as murder or high treason, are punished by death; less serious, such as larceny or fraud, only by deprivation of freedom. The duration of imprisonment bears a direct relation to the importance that is attached to the delict from the point of view of the social interests that are to be protected by the legal order. Delicts of lesser importance, as, for instance, violation of traffic regulations, are threatened only with fines. Their amount also depends upon the relative harmfulness of the violation of the norm. In the field of the civil law it is not the social, that is, collective, interests, but the interests of individuals, whose protection takes first place. Even here, however, the severity of the sanction depends on the seriousness of the delict; and this in turn depends upon the seriousness of the damage caused by the delict. As the sanction in this case serves for reparation of the damage, this relationship between the delict and the sanction exists *a priori*. It is a relationship of equivalence.

In international law this differentiation of the sanction in punishment and in civil execution that is so characteristic of modern national law is lacking. This differentiation is just as foreign to international law as to the law of the primitive community. The distinction between reprisals and war has nothing to do with the differentiation between punishment and civil execution. In this sense it

is to the point to emphasize that the sanctions of international law — reprisals and war — are not punishments, and international law is not penal law. One cannot deny, however, that the function of the sanction of international law, like the punishment of national law, is prevention. Yet there is nothing to preclude using the property taken from an opponent by reprisals or war for the reparation of damage illegally caused by this opponent. In this case, the sanction of international law functions as civil execution as well. The whole differentiation between penal and civil law has no place in international law, because of the lack of a corresponding differentiation of the sanction. Hence, it is likewise impossible to characterize the international delict as criminal or civil. It is a "delict" only in the sense of being a specific condition of the sanction. If it is deemed necessary especially to point out that the sanction of international law is not punishment, and the violation of international law is no "crime" in the sense of the criminal law, the meaning is only to exclude the moral connotations attached to the concepts of "punishment" and "crime." These moral connotations, however, should be excluded likewise from the analogous concepts of national law. In the formulation of purely juristic concepts they have no place at all.

International law lacks not only the differentiation between punishment and civil execution, but also the principle of equivalence between delict and sanction. Reprisals and war do, it is true, represent two different degrees of sanction, two different degrees of forcible interference in

the sphere of interests of a state. But international law does not make the decision for one or the other of the two sanctions dependent upon the seriousness of the international delict against which the sanction is a reaction. According to general international law, the injured state is free to choose the sanction by means of which it wishes to react against the person who injured it, without regard to the seriousness of the delict, that is, to the kind of injury. This is one of the worst lacks in the technique of international law.

6. DECENTRALIZATION

(a) *Centralization and decentralization in a static sense*

The most significant difference between the technique of international law and that of national law concerns the degree of centralization or decentralization of the communities constituted by international law and by national law. In order to understand this, it is necessary first to define the essence of the phenomenon called centralization or decentralization.[2] It is a social phenomenon, by no means restricted to the field of law. In this connection, however, it will be considered only in so far as it can be observed in legal communities.

[2] "La centralisation est un mot que l'on repète sans cesse de nos jours, et dont personne, en générale, ne cherche à préciser le sens." Alexis de Tocqueville, *De la Démocratie en Amérique* (17th ed., 1886), I, 148. This is true even today, although the problem of centralization and decentralization is of the greatest importance for social organization. The outlines of my juristic theory of "Centralization and Decentralization" appear under this title in Harvard Tercentenary Publications: *Authority and the Individual* (1937), pp. 210–239.

One may speak of centralization and decentralization in a double sense — a static and a dynamic sense. The static concept has reference to the territorial sphere of validity of the norms that constitute a legal order. The territorial sphere of validity of a norm is the territorial extent throughout which the norm is valid. If a legal norm determines human behavior as a condition or a consequence, it must also determine the space within which this behavior is to take place. The territorial sphere of validity is the space the legal norm determines for the behavior regulated by it. The so-called territory of the state is, from a juristic point of view, the territorial sphere of validity of the national legal order, the personification of which is the state. A static conception of a centralized legal order implies that all its norms have the same territorial sphere of validity, and that they are valid through the whole territory over which the order extends. A decentralized legal order, on the other hand, consists of norms which have different territorial spheres of validity, so that all or certain norms are valid only for parts of a given territory. These parts are the territorial subdivisions. The norms valid for a part only of the territory, for a subdivision of the total, are called decentral or local norms. The norms valid for the subdivisions form partial legal orders, and constitute partial legal communities, which are members, distinct in space, of the total legal community. The total legal community is constituted by the legal order embracing not only the local norms but the central norms as well. That the territory of such a com-

munity is subdivided means that certain norms of the legal order constituting the community are valid only for those territorial subdivisions, that the norms of this legal order have different territorial spheres of validity. This legal order is composed of central and local norms; this legal order is decentralized. If one considers in particular the legal community of the state, its so-called territorial division is nothing but the decentralization of its legal order.

Two norms valid for different regions but relating to the same subject matter, that is, norms which though having different territorial spheres of validity have the same material sphere of validity, may regulate their subject matter in different ways in the two different territorial spheres. This possibility of regulating the same subject matter in different ways in different parts of its territory is one of the principal reasons for the decentralization of the state. The considerations which render advisable such differentiation of the legal order of the state for different parts of its territory are manifold. Geographical, national, and religious differences within the material to be regulated by the law must be taken into consideration; the larger the territory and the greater the possibility of differences in the social relations which are to be regulated the more necessary is decentralization, or — which amounts to the same thing — territorial division of the legal community.

The decentralization of the legal community may be of varying degrees. The actual degree is determined by the relative proportion of the number and importance of the

central and decentral (local) norms of the legal order. Centralization and decentralization are two aspects of the same phenomenon. The greater the centralization, i.e., the greater the number and importance of the central norms, the less the decentralization. The greater the decentralization, i.e., the greater the number and importance of the local norms, the less the centralization. We distinguish, therefore, total and partial centralization and decentralization. Total centralization prevails if all the norms of a legal order are valid without exception for the entire territory; total decentralization prevails if all the norms without exception are valid only for territorial subdivisions. If there is total centralization or decentralization, the degree of decentralization or centralization, respectively, is zero. But total centralization and total decentralization are only ideal extremes. Positive law knows only the most varying types of partial centralization or decentralization, between the two extremes of total centralization and total decentralization.

(b) *Centralization and decentralization in a dynamic sense*

The problem of centralization and decentralization has not only a static aspect in which it is concerned with the different territorial spheres of validity of the norms constituting a legal order. It has also a dynamic aspect. In this dynamic aspect it is concerned with the methods of norm-making, especially with the organs creating and executing the norms. The criteria of dynamic centraliza-

tion or decentralization are in the first place whether the central and local norms are created and executed by the same organ — that means dynamic centralization — or by several organs — that means dynamic decentralization. Centralization in the static sense is possible, whether there be one or more organs to create the central norms. But the idea of centralization finds a more significant expression when all central norms are created and executed by a single, simple organ, an organ which is not composed of several individuals, when static and dynamic centralization are combined.

The concept of centralization is commonly connected with the idea of norms valid for the whole territory and created by a single organ, which, so to speak, forms the center of the community and is generally located in its geographic center. On the other hand, the concept of decentralization is generally connected with the idea of a plurality of organs, which are not centrally located but spread over the whole territory, and are competent to create norms valid only for subdivisions of the territory. It is the idea of a legal order decentralized not only in a static but also in a dynamic sense.

For the dynamic conception of centralization and decentralization not only the unity or plurality of the organs is of importance but the manner of their creation as well. A hereditary monarch, or a minister appointed by such, on the one hand, and a president elected by the whole nation on the other, clearly illustrate the contrast between centralized and decentralized creation of organs.

(c) *General (common) and particular international law*

If the international legal order is now tested as to the degree of its centralization or decentralization, the following is apparent: first, as to centralization and decentralization in the static sense, it is obvious that only a comparatively small part of the norms of positive international law are valid throughout the whole territorial sphere of its validity, that is, throughout the territory of all the states comprising the international community. They are the norms of so-called common or general international law. Immeasurably greater than the number of these norms originating from custom and valid for all the states is the number of norms of particular international law. These are norms that are valid for only two or more states. They are norms which have ordinarily been created by treaty, and obligate and authorize only the contracting parties. It is these norms of particular international law that give concrete shape to the political and economic relations between the states. In them resides, as a practical matter, the chief importance of positive international law. At bottom the norms of general international law provide only the possibility of establishing such legal relations.

In a certain sense the norms of general international law, valid throughout the whole extent of the international community, can be compared to the constitution of a state on the basis of which the material legal order is built up. General international law furnishes the constitution of the international community. For its weightiest norm is the

rule *pacta sunt servanda* — the rule according to which particular international law is created. But its norms are purely local in character; only the norms of general customary international law are central norms. The whole difference between general and particular international law is nothing but this difference between the central and the local norms of international law. The distinction lies essentially in the static conception of centralization and decentralization. If under this heading the international legal order be compared with the legal order of a state, especially a unitary state, it will be seen that here the relation between central and local norms is just the reverse. Most of the norms are valid throughout the entire extent of the state, that is to say, they have a central character. The number and importance of norms valid only for parts of the territory — the local norms — is comparatively small.

The situation is different and approaches that of international law when the state is not a unitary but a federal state. Here the number and importance of the norms that are valid only for portions of the territory are very considerable, and the degree of decentralization in the static sense is quite high. In a confederacy of states, however, the relation of local to centralized norms is shifted even more in favor of the local norms. The decentralization is even greater. A confederacy of states, however, is already an international community in itself; it is no longer a state as is the federal state. The degree of decentralization possible to a state has been exceeded.

If we look at the international community, embracing all states and constituted by general international law, it reveals the highest degree of decentralization in the realm of positive law. The number of central norms is at the minimum. A large majority of the norms have only local character. If one considers that every local norm, every system of local norms valid for the same territorial sphere, constitutes a local or partial community, then the universal international community is comprised of numerous international partial communities, constituted by the numerous international treaties in force at the moment.

There are teachers of international law who deny the existence of a general international law and maintain there is only particular international law. This is of course wrong. There would be a general international law even if it consisted only of the norm *pacta sunt servanda*, the rule which makes possible international treaties, and hence particular international law. But the opinion that there is no general international law at all is significant. It shows that the circle of the central norms in international law is so restricted that they can easily be overlooked.

(d) *Decentralization of the creation of international law*

The decentralization of the international legal order, or of the international community constituted by it, appears even greater if regard is had not for the territorial sphere of the validity of the norms constituting the international order, but for the methods according to which the norms

of international law are created and executed, and especially the organs that create and execute them.

The two methods of creating international law, the two "sources" of international law, are custom and treaty. Custom is *par excellence* the decentralized method of creating law. According to the principle of customary law, individuals ought to behave mutually as they are accustomed usually to behave. The circumstance by which the norm is created is the uniform and continuous behavior of individuals. By this uniform and continuous behavior a norm is created according to which this conduct is established as that to be followed by the individuals.

In principle, therefore, all the individuals belonging to a legal community partake in the creation of a norm of customary law. The essence of this sort of creation of law is clearly apparent if it be compared with legislation. We speak of legislation in the specific and narrower sense when a special organ, different from the individuals subject to the legal order, is set up for the creation of legal norms, of general norms, valid for all the subjects of the law. It is the principle of division of labor that finds expression here. The creation of law — the creation of general legal norms — is no longer a function of all the members of the legal community but is passed over to a special member, a special organ, set up for this purpose. This is a typical occurrence of centralization. Division of labor is essentially centralization. Compared to legislation, the creation of law through custom is a decentralized method of creating law. For the creation of customary

law is the result of a process in which all members of the legal community work together. Every individual is an organ for the creation of the law. The organs for the creation of law are, so to speak, scattered throughout the whole realm of the law. In international law in the first place it is the states, or, more correctly, the constitutionally competent organs of the states, that create customary international law by their acts involving other states; in the second place it is the international courts, established by international treaties.

But the international treaty is also a form of decentralized creation of law. It is distinguishable from custom principally because the acts constituting custom do not have to be consciously directed toward the creation of law as do the expressions of will constituting a treaty or a statutory act. A treaty is a decentralized creation of law because the creation of the norm — as with custom — emanates from the very subjects whose behavior is regulated by the norm, not from an organ different from them.

To the extent that national legal orders recognize custom and treaty as law-creating facts, there is no difference between national and international law. In the beginnings of legal development, custom and treaty are actually the only sources even for national law. The modern state is characterized, as regards its method of creating law, by the fact that in addition to custom there is legislation, that is, the creation of general norms by central organs. Very often, indeed, custom is done away with as a source of law. The treaty (here the contract) is admitted only for a lower

grade of law-creating, as a legal transaction, regulating concrete relations among subjects of the law on the basis of statutes or customary law only. The development of legislative organs indicates a centralization of the creation of general legal norms. The development of national law shows a clear tendency toward such centralization in the creation of law.

(e) *Decentralization of the application of international law*

The difference between national and international law is much more pronounced in the field of the application of the law than in that of the creation of the law, the creation of general legal norms. The general norm, created by custom or by legislation, must be applied to the concrete case. According to national law, this is accomplished by the courts and the administrative authorities, in the beginning only by the courts; for the development of the administrative function of the state, and hence the development of administrative organs followed only at a later stage. Now what does it mean to say that legal norms created through custom or legislation are applied to concrete cases? To answer this question it must be borne in mind that the legal norm attaches certain consequences to certain conditions, in the last analysis, the act of coercion functioning as a sanction: punishment or civil execution. The function of the court consists in authentically determining whether the conditions set up by a given general norm are present in the concrete case. The most impor-

tant among these conditions is the fact called the "delict," the so-called violation of law. Ordinarily the question whether or not a delict has been committed, and what delict, is disputed. The individual to whom illegal conduct is imputed in the judicial proceedings usually denies it. And even if he does not, still it is required, according to the stipulations of the legal order, that the conditioning circumstances and especially the delict be authentically established by the court if the sanction is to be executed against the individual responsible for the delict.

This establishment by the court of the conditioning circumstances is of the greatest importance from a technical point of view. It removes from the immediately interested parties the answering of the decisive question and commits it to a central, impartial authority distinct from the parties. This means a centralization of the application of law in regard to the establishment of the conditioning circumstances. Only by such centralization is a situation created in which it is possible to answer unequivocally under all circumstances the question whether in a concrete instance a delict, and thereby the condition of a sanction, has in fact been committed or not. In the absence of a central authority to answer this question an unequivocal decision is possible only — as was pointed out in the second lecture — if the party whose interests are injured and the party who is being made responsible for the delict agree as to the existence of the delict. Agreement on such a point can obviously seldom be reached.

This is the condition of a primitive legal order which

has not yet established courts. It is the condition of general international law. It is characterized by a complete decentralization of the application of law in regard to the establishment of the conditioning circumstance. This is of especial importance when it is a question of deciding whether an international delict, and thereby the condition of an international sanction, has occurred. The extensive consequences of the fact that according to general international law it is the parties themselves that are competent to decide this question has already been mentioned in another connection. But the complete decentralization of the procedure for establishing the conditioning circumstance is of importance in international law not only for the question whether in a concrete case a delict has been committed or not. All the other circumstances that international law stipulates, in a general way, must be established for the concrete case. There are in law no absolute circumstances, no facts *per se*, no facts immediately evident. There are only facts established in a prescribed procedure by competent authorities.[3] And according to general international law, these authorities are the legal subjects themselves, the states, and not a special organ different from the legal subjects and independent of them.

Thus general international law defines a "state" in the sense of international law, that is, it specifies under what conditions a coercive order is to be regarded as a national legal order, a community constituted by this order, as a

[3] Cf. my "Legal Technique in International Law," Geneva Research Centre, *Geneva Studies*, vol. x, no. 6 (1939), pp. 74 ff.

state, a man or a group of men, as a government in the sense of international law. The decision whether in a concrete instance a state — a "new" state — has come into existence or not, whether an old state has ceased to exist or not — the decision of these questions general international law leaves to the states themselves, that is, to the organs representing them, the governments which are interested in the decisions. That is the legal import of the acts called "recognition" of a state or of a government. In them the decentralization of the application of the law so characteristic of international law is expressed most significantly.[4]

If the legal order has established a special organ for the application of the general norm to the concrete instance, especially a court, this organ not only has to determine whether in the concrete instance the conditioning circumstances exist to which the legal order attaches certain consequences, especially the act of coercion which functions as a sanction. This is not enough. The establishment of facts is not sufficient. The court must also decide whether any norm of the legal order is to be applied, and which one is applicable. Only in this way can the court determine the sanction which has been provided for this case by the legal order. Even this decision has to be made by the state itself — a directly interested party — according to general international law. In this respect, too, the application of law is decentralized in international law.

[4] Cf. my "Recognition in International Law," *American Journal of International Law*, XXXV (1941), 605 *et seq.*

It is easy to see what an enormous difference there is between a situation in which all these decisions involved in the application of the law have to be made by the interested parties themselves and one in which they are made by an objective authority; between a condition of decentralized and centralized application of law. One may say that, regarded from a technical juristic point of view, the centralization of the application of law is of much greater importance than the centralization of the creation of law, the creation of general legal norms; that the establishment of courts is a greater step forward in legal technique than the establishment of legislative bodies, the supplanting of customary law by statutory law.

However, the process of the application of law is not over with the decree of the sanction specified for the concrete case. If need be, the sanction must be executed against the will of those responsible for the delict. In international law, as has already been brought out in another connection, even the execution of the sanction is decentralized — left to the interested parties. It is the condition of self-help characteristic of primitive law. Centralization of the execution of the sanction involves not only the establishment of special executive organs, but concentration of the means of power as well. It is principally in the centralization of the execution of the sanction that the national, the statal, legal order is distinguishable from the primitive pre-statal, and from the likewise primitive super-statal, the international legal order.

The decentralization presented here characterizes the international community constituted by general international law. By particular international law, international communities may be constituted whose centralization far exceeds that of the community constituted by general international law. But this centralization is possible only within certain limits. First of all, the establishment of an international community whose centralization is to exceed that of general international law, especially by the creation of central organs such as international courts, is possible only by international treaty; that is, only by means of a decentralized creation of law. In the next place, the centralization of the legal order thus created by an international treaty cannot exceed a certain degree, or the order and the law created according to it will assume the character of national law. The formation of a federal state from previously independent states by means of an international treaty is an example.

(f) *Conclusion*

In the present lecture, all the essential elements of the legal technique have been presented whereby international law is distinguishable from national law. These are as follows: International law

(1) obligates and authorizes individuals not directly but indirectly;
(2) recognizes collective not individual responsibility;
(3) does not recognize responsibility dependent on fault (culpability) but only absolute liability;

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(1) obligates and authorizes individuals not directly but indirectly;
(2) recognizes collective not individual responsibility;
(3) does not recognize responsibility dependent on fault (culpability) but only absolute liability;

(4) knows no differentiation of the sanction in punishment and civil execution;

(5) provides no equivalence between the delict and the sanction;

(6) is characterized by decentralization in the static sense, that is, the local norms outweigh the central norms, the rules of particular international law are more numerous than those of general international law;

(7) is characterized by decentralization in the dynamic sense, that is:

(a) the creation of law is decentralized, custom and treaties being the sources of International Law;

(b) the application of law is decentralized, that is, there are no courts, the conditioning circumstances, especially the delict, are established by the parties themselves;

(c) the execution of the sanction is decentralized, the principle of self-help prevails.

Having answered the theoretical question of the essence of international law by means of an analysis of its structure, we can now turn to the political problem. How can peace among states be secured within the framework and by means of the specific technique of international law?

LECTURE V

FEDERAL STATE OR CONFEDERACY OF STATES?

I. CENTRALIZATION AS A MEANS FOR SECURING PEACE

IN THE previous lectures it has been shown that international law has the same function as national law, the specific function of all law: to render possible the peaceful living together of the subjects whose conduct is regulated by the legal order.

It is well known that national law fulfills this purpose of assuring peace within the legal community incomparably better than the international legal order, and for the reason that its technique is vastly superior to that of international law. If now the technique of the two orders be compared and it be asked which of the distinctive elements of national law is the basis of its superiority as an order promoting peace, it can without hesitation be asserted that this element is the element of centralization.

There is centralization — in the static sense — as has been seen, if all, or if most and the most important, norms of a legal order are valid for the whole extent of the legal community, and in such a way that the greatest possible number of subject matters are regulated uniformly for all individuals living in the territory. By such regulation, there is constituted among the individuals a community

of interests by which the outbreak of conflicts among them is relatively restricted. An example will explain: if the money matters of individuals that belong in other respects to different legal communities are so regulated that the norms in question are valid in the same way for all these individuals — that is to say, throughout the territorial extent of all these legal communities — then the monetary system is centrally regulated for the entire area. In such a case, conflicts of interest among these individuals or among the legal communities to which they belong arising from the fact that each community has its own monetary system are automatically precluded. The same is true for other fields of public life, especially of economic life.

Centralization of this sort, in the static sense, is best guaranteed by centralization in the dynamic sense; that is, by centralization of the creation of law, by the setting up of a central legislative organ. This organ must be competent to create general norms for all the different legal communities to which the individuals belong. The more subject matters the central legislative organ is competent to regulate — that is, the more extensive the material competence of this legislative organ — the greater can be the centralization in the static sense, the greater can be the number and importance of the norms in force for the entire territory, the further the community of interests created by the law can go.

Even more effectively than by centralization of the creation of the law, of the general legal norms, the assurance

of peace is guaranteed by centralization of the application of the law and especially by centralization of the execution of the sanctions provided; that is, by the establishment of courts for the settlement of conflicts between the members of the different legal communities and between these legal communities themselves, and by concentration of the means of force and the institution of a central executive organ. As the application of the law is accomplished not only by the courts but by the administrative organs as well, the process of centralization can be extended in this direction too, and lead to the setting up of central administrative organs to execute the central administrative statutes. These administrative organs are normally responsible to a central government which is invested with executive power.

If the various legal communities to which the individuals belong are states, then the establishment of a centralized order of this sort for all these states involves the creation of a new state embracing the previously independent states. This is true even when the new order is created by means of a treaty, which states — up to then independent — conclude with one another. The degree of centralization of this new order, and only that, determines whether the community constituted by it is a state or merely an international union of states, and, if a state, whether a federal state or a unitary state.

2. CENTRALIZATION OF LEGISLATION IN A FEDERAL STATE AND IN A CONFEDERACY OF STATES

The federal state, which stands between an international union of states and a unitary state, presents a degree of decentralization that is still compatible with a national legal community, a state, and a degree of centralization that is no longer compatible with an international legal community, a community constituted by international law. The federal state is characterized by the following marks:

Its legal order is composed of central norms, valid for the entire territory of the federation, and local norms valid only for portions of its territory, for the territories of the "component states." The creation of the central norms is accomplished by a central legislative organ; the norms created by it are called "federal" laws. The creation of local norms is accomplished by local legislative organs, the legislative organs of the component states. This presupposes that the subject matter of legislation, the material sphere of validity of the legal order — in other words, the material competence of the state — is divided among one central and several local authorities. The broader the competence of the central organ — the federation — the narrower must be the competence of the local authorities, of the component states, and the greater must be the degree of centralization.

The central norms form a central legal order by which a partial legal community is constituted which comprises all the individuals residing in the whole territory of the

federal state. This partial community constituted by the central legal order is the "federation." The local norms, valid only for definite parts of the whole territory, form local legal orders by which partial communities are constituted, each of which comprises the individuals residing in one of the parts of the whole territory. These partial communities are the "component states." Every individual belongs at the same time to a component state and to the federation. The federation — the central legal community — together with the component states — the local legal communities — forms the federal state, the total legal community.

Each of the partial communities, the federation and the component states, rests upon its own constitution, the federal constitution and the constitutions of the component states. The federal constitution is usually considered at the same time as the constitution of the whole federal state.

The federal state is characterized by the fact that the component states possess a certain measure of constitutional autonomy, that is to say, that the legislative organ of each component state is competent in matters concerning the constitution of this community, that changes in the constitutions of the component states can be accomplished by statutes of the component states themselves (and after the establishment of the federal state, and within its framework, only changes in the constitution, not new constitutions, are possible). This constitutional autonomy of the component states is usually limited, it is

true. The component states are bound by certain constitutional principles of the federal constitution, for instance, according to the federal constitution, the component states may be obliged to have democratic-republican constitutions. By this constitutional autonomy of the component states — even if limited — the federal state is distinguished from a relatively decentralized unitary state organized into autonomous provinces. If these are regarded merely as autonomous provinces and not as component states, it is not only because their competence, especially the competence of the provincial legislation, is relatively restricted, but also because these provinces have no constitutional autonomy, because their constitutions are prescribed for them by the constitution of the state as a whole, and can be changed only by a change in this constitution. Legislation in matters of the constitution is here completely centralized, whereas in the federal state up to a certain point it is decentralized.

The centralization in the federal state — that is, the fact that a considerable portion of the norms of the federal legal order are valid throughout the entire extent of the federation — is limited by the fact that the central organ for the creation of law is comprised in the following manner, especially typical of the federal state: it consists of two Houses. The members of one are elected directly by all the people of the federal state; this is the so-called House of Representatives, or Chamber of Deputies, also called the Popular House. The second chamber is comprised of individuals chosen either by the people or

by the legislative organ of each component state. They are looked upon as representatives of these component states. This second chamber bears the name House of States or Senate. It corresponds to the ideal type of the federal state that the component states should be equally represented in the House of States; that each component state, without regard to the extent of its territory or the number of its inhabitants, should send the same number of representatives to the House of States. This provision shows that the component states were originally independent states, and are still to be dealt with according to the principle of international law known as equality of states. This composition of the House of States guarantees that the component states, the local communities, "as such," take part in the central procedure of legislation. This amounts to an element of decentralization. But this element of decentralization, based on the idea of the equality of the component states, is almost completely neutralized by the fact that the House of States passes its resolutions according to the principle of majority. It is by this very fact that this legislative organ is divested of its international character.

A purely international union of states, amounting to an organized community, as, for instance, the League of Nations, can resemble a federal state in many respects. The constitution of this community, called a "confederacy," is the substance of an international treaty, as is normally the case with a federal state as well. The constitution of a confederacy is a legal order valid throughout the

territory of all the states of this international community. It has the character of a central order and constitutes a community in relation to which the separate states, the so-called "member" states — like the "components" of the federal state — are partial communities, constituted by their national legal orders. The constitution of such a confederacy can set up a central organ competent to enact norms valid for all the states of the community, that is, throughout the entire extent of the union. This organ can be compared to the central legislative organ of a federal state. It is ordinarily a board, composed of representatives of the member states. These representatives are appointed by their governments. Normally, it votes its resolutions binding on the members of the union unanimously, each member state represented in the central organ having the same number of votes. Binding majority resolutions are not excluded, but they are the exception. The Assembly of the League of Nations is such an organ, for instance.

The constitution of the confederacy ordinarily contains no provision in regard to the constitutions of the member states. Yet it is possible for the constitutional autonomy of the members of even a purely international union to be restricted to a certain extent. For instance, the Covenant of the League of Nations requires that each member of the League be a "fully self-governing" state. There would be nothing to prevent the agreement comprising the constitution of a confederacy from obliging the member states to have democratic-republican constitutions.

3. CENTRALIZATION OF EXECUTION IN A FEDERAL STATE AND IN A CONFEDERACY OF STATES

In the federal state it is not only the legislative competence that is divided between the federation and the component states, but also the judicial and the administrative competence. Besides federal courts, there are the courts of the component states; besides the administrative organs of the federation there are those of the component states. The supreme federal court is competent not only for the settlement of certain disputes and for the punishment of certain crimes of private persons, but also for the settlement of disputes between the component states. At the head of the federal administration there is a federal government vested with executive power that can be employed not only in the form of execution of sanctions against individuals, but also — as so-called federal execution — against the component states as such, whenever they, that is, their organs, violate the constitution of the federation which is at the same time the constitution of the whole federal state.

At the head of the administration of each component state there is a government of that state. The form of the government — of the federation or of the component states — may be monarchical or republican, and, in the latter case, it may correspond more or less to democratic principles. The government may be a simple or a composite organ, that is to say, it may consist of a single individual or of several, and these may — but need not

necessarily — constitute a board, passing its resolutions by majority vote. The government, especially the head of a republican federal state, is elected either directly by the people or by the legislative organ.

The constitution of an international confederacy, a union or a league of states, can also set up a central court and a central government. But the court is, normally, competent only for the settlement of disputes between the member states; only exceptionally may private persons be admitted as plaintiffs or defendants. The central governing organ has the character of a board. If it is to be an organ different from the central legislative organ already mentioned, then not all the members can be represented on it, or not all in the same way. An example is the Council of the League of Nations, upon which only the great powers are permanently represented, and for periods of time, a portion of the other member states. For the decisions of this organ, too, the rule of unanimity prevails.

4. DIVISION OF COMPETENCE IN A FEDERAL STATE AND IN A CONFEDERACY OF STATES

Among the subjects that in a federal state usually fall within the competence of the federation are all foreign affairs, hence, specifically, the conclusion of international treaties, the declaration of war, the conclusion of peace and control of the armed forces. This is to say that the army and the fleet are organs of the federation, not organs of the component states, which, as such, have nothing to do with international affairs. The army and the fleet are

usually under the command of the head of the federal state. It may happen that the component states retain certain jurisdiction in the matter of the armed forces. But this can be only very insignificant, as the armed forces are most closely connected with the foreign policy, which appertains exclusively to the federation. Just in those fields where the so-called power of the state is most evident, a federal constitution leads to a very considerable restriction of the competence of the component states — of their sovereignty, as it is usually called in this connection.

The competence of an international confederacy is usually limited to the settlement of disputes between the member states and defense against external attack. The competence of the member states in the field of external politics and military affairs remains practically unrestricted. There is no centralization of the executive power. The confederation has no police, army, or fleet of its own. The member states remain in unrestricted possession of all their instruments of power, especially of their armed forces, their armies and their fleets. If it becomes necessary to wage war against states outside the confederacy, the member states must place at the disposal of the central organ of the confederacy the necessary armed forces. If a military sanction is to be executed against a member state guilty of violating the constitution of the confederacy, this too is possible only with the armed forces contributed to this end by the other member states. As the state against which the sanction is directed has an army and navy of its own, the execution of the sanction means war

within the community. And the violation of the constitution of the confederacy may consist in one member state resorting to war against another. All this is precluded in a federal state if the executive power is so centralized that the component states have no military armed forces at their disposal.

It is a characteristic element of a federal state that there is federal citizenship even if each component state also has its state citizenship. If this is so, then each individual is a citizen of a certain component state as well as a citizen of the federation; and stipulations must be provided to regulate the relations between the two institutions. In the international confederacy there is no citizenship of the confederation. The individuals are citizens of the member states only, they do not belong to the international community, or not directly.

The jurisdiction of the central organ of the federal state in other matters is not so important as in the field of foreign affairs, military matters and state citizenship. Ordinarily the federation has considerable authority in the economic field, too, especially in relation to monetary matters, and in the field of customs matters (in connection with foreign relations). Usually the federal state constitutes a single customs and currency unit. It is important that the federation has the right to levy and collect taxes to cover the expenses of its activity in the fields of legislation, judiciary, and administration. By the tax laws and by the military laws of the federation, individuals are directly obligated to the performance of cer-

tain duties. The local states do not, as in a confederacy, have to contribute contingents of troops and fixed sums of money to the confederation, and, hence, on their own part, first have to enact the required laws, by which the individuals are obligated to military service and to the payment of taxes. The requirements from individuals are the subject matter of legal duties which in the federal state are enacted directly by federal statutes. And the fact that the central norms, the federal laws, obligate and authorize individuals directly, without any mediation of local norms, of laws of the component states, is a characteristic of the federal state.

In this respect it is distinguished especially strikingly from the international confederacy. The central norms of the legal order constituting the confederacy obligate and authorize directly only the states; the individuals are affected only indirectly by the medium of the legal orders of the states to which they belong. The mere indirect obligating and authorizing of individuals is, as has been seen, a typical element of the technique of international law. In the very fact that the central norms of the legal order of a federal state set up direct obligation and authorization of individuals, this order proves that it is a national, not an international, legal order. And in this connection, in consideration of the relation of the central to the local norms of the legal order of a federal state it becomes apparent that the difference between direct and indirect obligating and authorizing of individuals can also be conceived of from the point of view of centralization and

decentralization. It is obvious that it implies a certain decentralization or a lesser degree of centralization if central norms can obligate and authorize individuals only through the medium of local norms; and, *vice versa,* it implies a certain centralization if the central norms have no need for this mediation of local norms to obligate and authorize individuals. In this respect, too, the federal state, in comparison with a purely international confederacy, presents a higher degree of centralization, and is, on this very account, a state, not merely a union of states.

This difference is also apparent in the fact that the member states of an international community, especially of a confederacy, normally have the possibility of leaving the community, withdrawing from the union, whereas for the component states of a federal state, legally no such possibility exists.

If the entire foreign policy is entrusted to the central organs of a federal state, especially if all international treaties are concluded by the competent organ of the federation, then it must be possible for the federation to execute these treaties. As international treaties may relate to any conceivable subject matter, even to subject matters which are reserved for the legislation and execution of the component states, it must be possible for the federation to interfere in this competence of the component states. Hence, with the extensive internationalization of cultural and economic life, the competence of the component states must become correspondingly limited. This tendency toward centralization, the gradual transition of the federal

state to a unitary state, is favored by other circumstances, also, that tend to the state control of economic life, to the development of state capitalism. It is almost inevitable that such centralization in the economic field should lead to a political centralization and hence to a certain leveling in the cultural field as well, if the component states that are united in a federal state belonged originally to different cultures.

5. COMPOSITION OF THE CENTRAL ORGANS OF A FEDERAL STATE

It is therefore understandable that the attempt by means of free agreement to combine different states previously independent into a federal state must meet with very great obstacles. It goes without saying that only this possibility of creating a legal community embracing many states within which peace is assured is under consideration, not the other possibility, that of the erection of a world empire by the force which a victorious state exercises over disarmed and conquered states. That was the way in which the Roman world empire and with it the *pax romana* was established. The Roman Empire was a hegemony of one state over all the others. What is now in view is an organization within which the states joined together would continue to exist as equal members but with limited competence. The question is only whether this organization should itself have the character of a state or merely that of an international league, a confederacy of states, and that, as has been seen, depends

upon the degree of centralization that can actually be achieved.

The chief difficulty to be reckoned with in an attempt to erect a universal, world federal state, comprising all, or at least many states, is usually considered to be that such a federal state implies a loss of sovereignty for the component states. In a mere international union or confederacy of states — as for instance the League of Nations — the member states, so it is said, retain their sovereignty; and hence the opposition to such an organization is less than that to the erection of a federal state. However, this formulation is not quite to the point. Sovereignty in the sense of complete freedom of action is not enjoyed even by an independent state, belonging to no union. Even if only general international law is supposed to be binding for the state, it must be recognized that the latter's freedom of action is limited. It can only be a question of the extent to which this freedom of action is to be legally restricted. Hence, in the differentiation between a federal state and a confederacy, the first thing to be considered is the limitation of the competence of the component or member states. And in so doing it is apparent that the greatest difficulty really is not that a renunciation of its competence in important matters is required of a state that is to become a member of a federal state, that competence in these matters is to be taken over by a common central authority. The separate states might agree to such a taking over of competence if only the composition of the central organ or organs offered an adequate guaranty

that their special interests would be protected. In the composition of the central organs lies the obstacle to the realization of an international treaty by means of which a federal state could be set up.

This is especially so when democratic principles are to be applied, and most of all if the federal state to be set up is for the very purpose of serving the idea of democracy. If democracy is interpreted in an individualistic sense, if the unit taken is only the human individual, not the national communities that are to become components of the federal state, then the idea of democratic equality leads inevitably, through the application of the democratic principle of the majority, to the domination of the nationals of the small states by the nationals of the large ones. This is the fate which a Finn, a Swede, a Norwegian, a Dutchman, a Belgian, a Swiss expects in a federal state which also includes the United States of America and the British Empire, upon the supposition that the members of the popular house, the chamber of deputies, are to be elected by the population of the component states in such a way that for a given number of voters there shall be uniformly a given number of delegates. Now the constitution of a federal state presents a counterweight to just this, in the second chamber of the legislature, the Senate. In this the component states are represented without regard to size. But is it seriously conceivable that in the Senate of a World State that passes its resolutions by a majority of votes, Denmark with its two and a half million inhabitants would be represented by the same number of votes as the

United States with its one hundred and thirty millions? Is it not directly contradictory to the fundamental principle of democracy that two and a half million individuals should have the same influence upon the formation of the will of the community as one hundred and thirty millions, and that, hence, the outvoting of the representatives of the large states by the representatives of the small states in the House of States is not impossible?

If the population of a federal state forms a national and cultural unit, the Popular House will be politically more important than the House of States, and will be considered the true representative of the whole nation in the process of federal legislation. The function of the House of States will be regarded as only an element of decentralization, limited by the majority principle. If the population of the federal state, however, comprises many nations very different in size, language, religion, and culture, the organization of a federal state may be interpreted in a different way; then the small nations may apprehend being outvoted by the large nations in the Popular House, and the large states may fear being outvoted by the small states in the House of States. If such a situation is to be avoided, or, at least, its drawbacks reduced to a minimum, then a community that is to include very large and very small states of different culture cannot be centrally organized to the degree which the constitution of a federal state demands, a constitution having proportional representation of the population in the Popular House and the principle of majority in the

procedure of the House of States. Both principles are incompatible with the idea of the equality of states.

6. CENTRALIZATION AND THE RIGHT OF SELF-DETERMINATION

It is just this tendency to maintain equality among the states that exerts a pressure toward decentralization, toward the technique of international law. Yet, if one assumes as the fundamental principle of democracy not only equality but freedom, freedom in the sense of self-determination, and if one takes as the unit, from a collectivistic viewpoint, national communities, not human individuals, then one must admit self-determination of peoples as a democratic requirement; and one must also admit that a community of states approaches the democratic ideal more closely by way of decentralization than by way of centralization. The problem is to unite a number of states whose nationals differ from one another in language, culture, and history, and who feel themselves different. If matters that the people of a member state regard as their own are regulated by norms that are valid for all the states of the community in common, and if these norms are created by a central organ in which these people are not represented or are represented inadequately, then these people will feel themselves injured in their right to self-determination. They will then demand decentralization in the name of the democratic right of self-determination, and will prefer a purely international organization of the community of states to a federal one. The principle of international law that binding decisions

can be reached only by unanimity, that no full member of the community can be obligated against its will, corresponds to the idea of self-determination. In primitive democracies, decisions binding upon all the members could, as a matter of fact, be made only by unanimous vote. He who was outvoted did not regard himself as bound. Such a state of affairs represents the highest possible degree of decentralization of the creation of law that is possible within a society. The majority principle in itself implies a certain centralization. It is not possible without a considerable restriction of the principle of self-determination, of democratic freedom.

7. THE EXAMPLE OF THE UNITED STATES AND SWITZERLAND

Opposed to the restriction of self-determination are, of course, the great advantages associated with the advanced technique of centralization. But these advantages weigh less when opposed by the right of self-determination of a people imbued with a strong feeling of nationalism, especially if this feeling of nationalism is based on the common possession of their own language, religion, culture, and long and glorious history. Opinions may differ as to the value and justification of nationalism, but one must reckon with this phenomenon as with other decisive facts, if one is proceeding to the establishment of a universal community of states. This is especially true if it is to comprise nations so different from one another in their language, religion, culture, and history, in their political and economic structure and in their geographic situation, as the

United States of America, South American, and European states.

If a federal state comprising all these states is proposed, the examples of the United States of America and Switzerland are usually referred to to show that these difficulties are not insuperable. But these examples prove little. In both instances, there had long existed among the members that were ultimately united into a federal state close historical-political relations; in both cases a mere confederacy had immediately preceded the federal state. In the case of the United States, essentially only an English-speaking, preponderantly protestant population was involved; their common economic and political interests led to the common political act of breaking away from the British mother country. The Swiss federal state does present a union of several ethnic groups very different as to language and culture. But it was only insignificantly small portions of three nations separated from them by historical and political circumstances, not these mighty nations themselves, that united to form a relatively centralized community. And this community is probably held together less by inner forces than by the external pressure that the political system of the great powers neighboring Switzerland bring to bear on this little state. A radical change in the mutual relations of these powers would be decisive for the existence of the Swiss federal state. Finally it must not be overlooked that, in the case of Switzerland as in that of the United States, geographically immediately contiguous territories were united to form the terri-

tory of a single state, and that on this score alone it is quite a different proposition to unite in a single state states of Europe and states of the American continent separated as they are by the ocean. To base the hope of the erection of such a federal state on nothing but the example of the United States and Switzerland is a dangerous illusion.

8. THE NEXT STEP

Still, the aim must not be regarded as unattainable. It is quite possible that the idea of a universal world federal state will, after a long and slow development, be realized, especially if this development is furthered by conscious political work in the ideological field. It is quite unlikely, however, that within a reasonable time great powers like the United States of America, Great Britain, or France will unite with dwarf states like Denmark, Norway, or Switzerland, republics and hereditary monarchies from one day to the next, to form a federal state. It is more than likely that this aim, if one accepts it as such, can be reached only by a series of stages. From the political point of view, the only serious question is what is the next step to be taken with a view to success on this road. Obviously it is only an international union of states that should first be set up. In this connection, the decisive question is what direction the centralization should be given in the constitution of the international community to be set up, in order that it may better assure international peace than the League of Nations.

LECTURE VI

INTERNATIONAL ADMINISTRATION OR INTERNATIONAL COURT?

I. CENTRALIZATION OF THE LAW-CREATING AND THE LAW-APPLYING PROCESS

THE evolution of law from its primitive beginnings to its standard of today has been, from a technical point of view, a continuous process of centralization. It may also be thought of as a process of increasing division of labor in the field of the creation and application of law. The functions of law-creating and law-applying, originally performed by all members of the community, have been gradually passed on to specified individuals and are now executed exclusively by them. In the beginning, every individual subject to the legal order participates in all the functions of creating and applying the law. Later, special organs develop for the different functions. In the field of law the same process takes place as in that of economic production. It is a constant process of centralization.

In the field of law, this process is characterized by the surprising fact that the centralization of the law-applying function precedes the centralization of the law-creating function. Long before special legislative organs come into existence, courts are established to apply the law to concrete cases. The law thus applied is customary law. Cus-

tomary law is law created by a specific method. The peculiarity of this method — as was pointed out in the previous lectures — is that the general legal norms are created by the collaboration of all the individuals subject to the legal order. It is a totally decentralized means of creating law. During thousands upon thousands of years it was the only way of creating general legal norms. The application of the law, however, long ago became the exclusive function of special organs, was long ago centralized. No longer is each individual authorized to decide whether or not his rights have been violated, whether or not he will react by a sanction against another individual responsible for the violation of law. Such decisions have for long been entrusted to a judge, a special organ different and independent from the parties in conflict. The general norms, however, in accordance with which the judge decides such conflicts are not even now created by a central organ; they still have the character of customary law. Customary law forms an important part of the legal order even in technically highly developed legal communities.

The procedure of applying general legal norms to concrete cases involves three distinct phases. First, the conditioning facts must be established, especially the delict, the concrete violation of law; second, the sanction provided by the general legal norm must be ordered to be applied to the concrete case; third, this sanction must be executed against the individual responsible for the delict. The three stages of this procedure do not necessarily be-

come centralized at the same time. Historically, the centralization of the first two stages has probably preceded the centralization of the third stage. The centralization of the employment of force, that is, the procedure by which a concrete sanction is executed against the responsible individual, seems to be the last step. The application of law by courts replaces the legal status of self-help by blood revenge.

It seems, however, that the state of self-help was only gradually eliminated. In the early days the courts were hardly more than tribunals of arbitration. They had to decide only whether or not the delict had actually been committed, as claimed by one party, and hence whether or not one party was authorized to execute a sanction against the other if the conflict could not be settled by peaceful agreement between them. To bring about such a peaceful agreement enabling the vendetta to be replaced by wergild was probably the first task of the tribunal. Only at a later stage does it become possible completely to abolish the procedure of self-help according to which the sanction is executed by the individuals whose interests have been violated by the delict. The execution of the sanction by a central organ of the legal community authorized to punish the guilty individual presupposes a concentration of the means of power — the existence of a central organ with all these means of power at its disposal. To centralize the execution of the sanctions provided by the legal order the legal community needs not only courts but also a powerful administration.

A legal community which has an administration and courts is a state, but a central organ of legislation is not an essential requisite of a state. The jurisdiction of statal courts is older than statal legislation. It is noteworthy that the French term *parlement* originally referred to a court.

Although the court preceded the legislative organ it was not the first central organ. The first central organ was probably the chieftain, in his position as military leader of his group in war against another group. In the beginning his was a position of no importance as far as the formation of law was concerned. As soon as the position of chief becomes a permanent institution and is concerned with legal matters, the chief appears as judge, not as legislator.

2. THE LAW OF EVOLUTION

The fact that the application of law is centralized much earlier than the creation of law is of the greatest importance. It seems to manifest a certain regularity of evolution originating in the sociological and especially in the socio-psychological nature of law. We may therefore presume with a certain degree of probability that the development of international law has the same tendencies as the development of national law. There is perhaps in the social field a certain analogy with the phenomenon called the biogenetic law, that is, the law according to which the human embryo in the womb passes through the same stages man as a species has passed through in the process of evolu-

tion from a lower to a higher stage of life. Thus perhaps the law of the universal, the international, community has to pass through the same evolution through which the law of the partial community, national law, has already passed. In fact, the first organized communities of international law, the first relatively centralized unions of states, are organizations the function of which is to settle conflicts. The first central organs in international life are international tribunals, instituted by international treaties. The function of these tribunals is confined to the establishment of the conditioning facts, to a decision whether or not in a concrete case the right of a state has been violated by another state. The decisions of these courts are not executed by a central executive power. In case the other state does not execute the decision of the court, the application of the sanction is reserved to the state whose right has been acknowledged by the court.

As a rule the international court is not competent to decide all the disputes which may arise between the contracting parties; its competence is usually restricted to certain disputes exactly determined by the treaty of arbitration; and this treaty is normally valid for a limited period of time only.

These facts show clearly that the law of the interstate community develops in the same direction as the primitive law of the pre-state community. They also suggest the direction in which a relatively successful attempt may be undertaken to secure international peace by emphasizing and strengthening the given tendency toward

national Justice, but a kind of international administration, the Council of the League of Nations. The Assembly of the League — its other organ — placed beside the Council, gives the impression of an international legislature. The dualism of administration and parliament was probably more or less distinctly present in the minds of the founders when they created two main organs of the League.

It might have been foreseen from the very beginning that a world government will not succeed if its decisions have to be taken unanimously, binding no member against his will, and if there is no centralized power to execute them. It is not to be wondered at that a world parliament, or whatever the Assembly of the League of Nations may be called, can be of only nominal value if the principle of majority is almost completely excluded from its procedure. This principle implies, as has been pointed out, a certain centralization of the procedure by which the will of the community is created. Without this minimum of centralization, a board — that is, an organ composed of several individuals — can hardly function successfully. Yet in the sphere of international relations the majority principle is, with one exception, without application. This exception is extremely significant, however. It is the procedure of international courts. Here and here alone is the majority principle generally accepted. If two or more states submit their disputes to the decision of a court of arbitration they presuppose as a matter of course that the decision may be arrived at by a majority of votes. Subjection to the majority vote of an international court is not

considered incompatible with the so-called sovereignty of the state. Subjection to a majority vote of any other organ, however, is generally rejected for the reason that such subjection is incompatible with the sovereignty of the state. If the international organ instituted by an international treaty has not the character of a court, the contracting states always insist upon their right to be represented on it during the procedure by which the binding norm is created, and on their right not to be bound against their will. On this point, the attitude of states towards international courts is, as a matter of fact, wholly different from their attitude towards all other international organs. In establishing an international community, this difference should be carefully taken into account. It was clearly manifested at the foundation of the League of Nations. The majority principle, systematically excluded from the procedure of the Council and the Assembly, has been introduced without any difficulty into the constitution of the Permanent Court of International Justice.

A critical analysis of the Covenant and an impartial examination of the activity of the League shows that it would have been more correct to make the principal organ an international court rather than an international administrative organ. Of all the political tasks entrusted to the League by its constitution, only the function stated in Articles 12 to 17, concerning the settlement of disputes, has been fulfilled with a certain degree of success. The disarmament of the member states provided for in Articles

centralization. Natural evolution tends toward an international judiciary. The first step toward an enduring peace must be the establishment of an international community the members of which are obliged to submit all disputes arising among them to a permanent international court and to respect the decisions of this authority. The chief thing is to subject as many states as possible to the authority of an international court competent to decide all conflicts arising among them. So far no such enterprise has been successful, perhaps because it has not been seriously attempted. Until this end has been attained, however, the other much more far-reaching one cannot possibly be achieved, namely, the establishment of a community of states subjected to a central administration with centralized executive power at its disposal, or even the establishment of a federal world state with a world-wide administration and a world legislature. According to the pattern of the evolution of national law, centralization of the judiciary must precede centralization of legislative and executive power.

To be sure, a different line of development for international law is not absolutely excluded. The laws determining social evolution are not so strict as biological and physiological laws. The human will directed to a certain end is able to shape social life arbitrarily, but only to a limited extent. Hence it follows that a social reform has more chance of success if it follows the tendencies hitherto exhibited by social evolution. It has less chance if it opposes these tendencies. It is relatively easy to proceed

to socialism from capitalism or even from state capitalism, but an attempt to attain the same object starting from feudalism is impossible, even senseless. For the same reason it is probably impossible to proceed directly from the completely decentralized state of the international community of today to a federal world-state. It is perhaps possible, however, to reach an intermediate state, that of an international community embracing many important states, and based on the principle of compulsory court jurisdiction. Such an organization would represent tremendous progress in relation to the present situation. Political idealists whose desires soar beyond this possibility to a world-state should always bear in mind that their ideal is attainable only by way of the intermediate stage of compulsory international jurisdiction. Nature makes no jumps; and neither can law.

3. THE LEAGUE OF NATIONS

The proposition that the next and most important step toward international peace is the establishment of an international court with compulsory jurisdiction is confirmed by the experiences of the League of Nations. This union of states, which is so far the biggest international community founded to secure international peace, has failed completely. Its breakdown is attributable to various causes. One of the most important, if not the decisive, cause is a fatal fault of its construction, the fact that the authors of the Covenant placed at the center of this international organization not the Permanent Court of Inter-

munity, and is therefore not provided by the Covenant of the League. If it is impossible to establish an armed force for the community of states — in other words, if it is not possible to establish a federal state — then the assistance rendered by the community to a victim of external aggression can consist only in the obligation of the other members to defend the attacked state. Under such circumstances the duty of disarmament becomes contradictory to the necessity of defense against external aggression. Nevertheless, the Covenant of the League puts the duty of disarmament in the foreground. Disarmament is to form the first duty of the members of the League, placed immediately after Articles 1 to 7 which deal with the organization of the League.

The duty of a state which is a member of a universal international community to defend another member state from attack by a non-member is very problematic, especially if the international organization embraces many states which have no common frontier, if these states have joined — in the first place — for the purpose of maintaining peace among each other, and if aside from this purpose they have no political interest in common that might unite them against the aggressor. It may be very difficult for a government to fulfill a duty to defend a member state — to enter into war against a state with which it is on good political and economic terms — especially if the aggression is based on grounds not entirely disapproved by the public opinion of the state obliged to give its succor. The situation of Great Britain and France in the conflict

between Czechoslovakia and Germany, a situation which led to the treaty of Munich, is a characteristic example. Treaties obligating the contracting parties to a joint war against third states are efficacious only if concluded between states having more interests and more important interests in common than those which form the basis of a universal international community. It is therefore not surprising that not only the provision of the League Covenant concerning disarmament but likewise the provision concerning mutual defense against external aggression (Article 10) has completely failed. The obvious violation of the territorial integrity of a member state, even the total destruction of its political independence, as the result of external aggression was not even made a subject of deliberation within the League; and that despite the wording and the spirit of Article 10. Such was the case in regard to Austria, Czechoslovakia, and Poland. Let us not forget that it was just on account of Article 10 of the Covenant that the United States of America refused to enter the League.

The duty of taking part in a military action — in a war — can be imposed upon the members of an international community even if the only purpose is to maintain peace among the members. The duty is required to meet the case of a member state which, in violation of the constitution, resorts to war against another member state or refuses to carry out the decision of the international court instituted by the constitution. Such action has the character of a collective sanction. From the point of view of the

a court with compulsory jurisdiction as the general conditions of every union of states whose aim is to maintain peace within the international community. Without the realization of these conditions no durable international community is possible.

Among the most important of these conditions are fairly satisfactory regulations of the territorial relations of the states forming the international community. The boundaries of the states within an international community must from the beginning be arranged in such a way that they do not violate any vital interests. Otherwise this community will have little prospect of a long-continuing existence. Vital interests, however, are not to be viewed as violated unless a considerable portion of the population is repressed by incorporation within a particular state organization against their wills. A satisfactory solution of the territorial problem is, therefore, possible only on the basis of the principle of self-determination. We must try to realize the right of self-determination of the peoples as extensively and honestly as possible. Where minorities are unavoidable they are to be organized as entities with constitutional rights. The treaty establishing the international community must grant them the status of personality in international law; that means that it will be possible for them to call upon the international court in case of violation of the provisions for minorities determined by the constituent treaty. Then all justified interests are protected. Disputes arising out of such a situation can very well be adjudicated by a court. For the court has

— at least in principle — to apply positive law to the concrete case.

(b) *The Lack of International Legislation*

Another objection which is continually brought against the establishment of a compulsory international jurisdiction is that the international legal order to be applied by the court is deficient and that there is no international legislative body empowered to reform this legal order. This analogy with national law asserts that a compulsory international jurisdiction is only possible if at the same time there is a sort of international parliament competent for the creation of law by majority vote. From the fact that it is impossible to form such a legislative body it is concluded that a compulsory international jurisdiction is also impossible.

This argument is incorrect in every respect. As I have shown, the development of national law indicates on the contrary that the obligation to submit to the decision of the courts long precedes legislation, the conscious creation of law by a central organ. Within the individual states courts have for centuries applied a legal order which could not be changed by any legislator, but which developed, exactly like present-day international law, out of custom and agreements; and in this legal system custom was for the most part formed by the practice of the courts themselves. We have no reason to assume that international law will necessarily develop differently from national law. The court which exercises the jurisdiction of deciding *all*

8 and 9 has completely failed. Article 10, guaranteeing the territorial integrity of the members against external aggression, has never been applied. Article 11 coincides in part with Articles 12 to 17 concerning the settlement of disputes. Insofar as Article 11 differs from Articles 12 to 17, by providing for the employment of essentially different means for the maintenance of peace, it has in fact never been put into practice. Article 19 was designed to make possible by legislative acts of the Assembly the modification of the legal relations among the members, but it was inapplicable from the very beginning because of technical insufficiencies in the text. Article 22, regulating the mandates, has permitted no more than sham activity. Articles 23 to 25 concern the so-called technical functions of the League, such as measures against the traffic in women, children, and opium. It is just this activity of the League which has been emphasized over and over again, to make the League appear in a more favorable light. This is rather significant, for the so-called technical functions of the League are so far from its essential aims that they need not be taken into consideration in this connection. The great political apparatus in Geneva was not put in motion to fulfill tasks of such secondary importance. Besides, for the performance of these duties other international organizations were already in existence before the foundation of the League of Nations. Among its specific functions, it has attempted to perform only the settlement of disputes among member states. The results obtained in this field, however, are not in proportion to the exten-

siveness of the organization or its bureaucratic machinery. The reason is that neither an international administrative organ, such as the Council of the League of Nations, nor a sham parliament, such as the Assembly, is fitted for this task, which by its very nature can be satisfactorily performed only by an international court.

4. MAINTENANCE OF INTERNAL PEACE AND DEFENSE AGAINST EXTERNAL AGGRESSION

The Covenant of the League placed the Council, not the Permanent Court, at the center of its international organization because it conferred upon the League not only the task of maintaining peace within the community, by settling disputes and by restricting the armament of the member states, but also the duty of protecting them against external aggression. This protection of member states against external aggression was all the more necessary because disarmament was set up as a main object of the League. The constitution of an international community can oblige a member state to restrict its armament to a considerable extent only if this state can reckon upon efficacious help from the community in case the state should be attacked by another state not belonging to the community and therefore not obliged to disarm. This is possible only if the disarmament of the members is accompanied by an armament of the community, if an armed force is formed which is at the disposition of the central organ. Such a centralization of the executive power is not possible within an international-law com-

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The experiences of the League of Nations show that it is necessary to make a clear distinction between the maintenance of internal peace and protection against external aggression; and that it is hardly possible to fulfill the second task by the specific means at the disposal of a universal international organization embracing many different states. It is a task with the fulfilling of which an international court has nothing to do. It is a function that lies beyond the possible activity of an international court, even beyond the power of a universal union of states the centralization of which does not exceed the degree compatible with its international character. As long as it is impossible to constitute this union of states as a federal state it seems to be more correct to limit its task to the maintenance of internal peace, and to leave protection against external aggression to political alliances between the member states. The constitution of the League should not forbid alliances between member states; it should only provide that alliances between member states should not be directed against other member states. On the

contrary, to maintain peace within the international community, its constitution should try to establish the strongest possible guaranty within the compass of international law; the submission of all disputes among member states without exception to the compulsory jurisdiction of an international court.

5. OBJECTIONS TO COMPULSORY JURISDICTION OF AN INTERNATIONAL COURT

(a) *Territorial Disputes*

The Covenant of the League conferred the main task in the settlement of disputes among members upon the Council of the League, not upon the Permanent Court of International Justice. It did this primarily because the authors of the Covenant could not make up their minds to establish an international court with compulsory jurisdiction for all international disputes of the members; and they could not make up their minds because they were prejudiced against such compulsory jurisdiction of an international court; and these prejudices still prevail today. To eliminate these prejudices by clearing up the true circumstances is one of the most important tasks in preparing intellectually for future peace.

One of the main objections against an international court with compulsory jurisdiction is that it is not possible to settle territorial conflicts between states by a judicial decision, especially if the dispute arises from a territorial claim which cannot be based on positive international law. This objection is correct, but it concerns not so much

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theory of national law and has often been refuted in that realm. It is false because it alleges the logical impossibility of a decision, although it can easily be shown that a decision is always logically possible. Either the claim raised by one state against the other in a legal dispute is justified by the legal order because a particular legal norm obligates the defendant to act in the required way, in which case the complaint is admitted; or the claim raised cannot be justified by the legal order, since the latter contains no legal norm obligating the defendant to act in the required way, and in this case the claim is to be rejected; and it is to be rejected on the basis of the positive, actually valid legal order, by application of this order which permits all its subjects to do or omit anything it does not forbid them to do or omit. This logically possible application of the legal order may be undesirable from a juridico-political, moral, or any other standpoint. But this may happen even in cases where one does not speak of "gaps" in the legal system because the complaint is allowed on the basis of the positive law. This reference to a "gap" in the legal system is only a way of expressing a desire to reform the legal system. If one knows the way in which courts exercise the function of reforming the legal order, then the argument of ostensible gaps in the legal system as an argument against the obligation to submit all conflicts to the decision of an international court no longer holds.

(d) *Legal Disputes and Political Conflicts*

The assertion which has already become a dogma that an international court can indeed decide about legal disputes but not about political conflicts can be treated in the same way. A dispute has a "political" and not a "legal" character when a party to the dispute tries to justify its position by appealing not to positive law but to another normative system, and therefore desires that the conflict be decided not on the basis of a norm of positive law but on the basis of another principle, such, for instance, as natural law or justice. The distinction between political and legal disputes, and the rejection or limitation of international jurisdiction based on this distinction, are again founded on the supposed need to reform the positive law, whether or not this reform is, in fact, necessary. It has been shown from the theory and history of law that it is an essential function of the courts, which can under no conditions be withdrawn from them, to reform the law to be applied. Therefore the distinction between political conflicts and legal disputes is bound to fail in the aim for which it was originally conceived — namely, to prevent the establishment of compulsory international jurisdiction.

6. THE POLITICAL INDEPENDENCE OF THE INTERNATIONAL COURT

In this connection it should be observed that to say that positive law is from one viewpoint or another inequitable or unjust is a subjective judgment of value. The party to

political ideology at the basis of the international community, it is totally different from a defensive war against a non-member state. As a matter of fact, the League of Nations, in spite of its complete failure in the cases of external aggression, has at least made certain efforts to fulfill its duty in the cases of illegal aggressions undertaken by member states against other member states. This was the case in regard to Manchukuo, Abyssinia, Finland.

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be set up beside the court solely to execute its decisions if, in opposition to the constituting treaty, a party to the dispute does not submit to the decision. This must be an administrative organ similar to the Council of the League of Nations. But its function must be restricted to the execution of judicial decisions. This fact will facilitate considerably its composition and particularly its procedure — especially in so far as it is necessary that its decisions be adopted according to the majority-vote principle.

If the treaty constituting the international community does not establish a central executive power — a central armed force at the disposal of the above-mentioned administrative organ — the decisions of the international court can be executed against a member state only by the other members of the community, if necessary by the use of their armed forces under the directions of the administrative organ. Such an execution of the judicial decision has the character of a collective sanction, even if performed only by one member state.

In addition to the nonfulfillment of a judicial decision by one of the parties to a dispute, there is, as I mentioned before, a second case of coercive proceedings by the community against a member who resorts to war against another member without calling upon the court. In this case also the collective sanction has the character of the enforcement of a judicial decision if the court has to be called upon either by the party affected or by the administrative organ itself to determine the illegal character of the action.

CONCLUSION

FROM our examination of the structure of international law, from our recognition of the intimate connection that prevails between its technical evolution and the progress of international organization, there emerges the conclusion that the forces working for world peace should not be directed to aims which today, in view of the present state of international relations, are not yet attainable. No attempts at reform should be undertaken which are doomed to fail, however good may be the intentions of the intellectual proponents and of the governments, for their failure would further envenom the international atmosphere and compromise the idea of peace, the only hope we have of a better future for the world. Let us rather concentrate and mobilize the energies of those who are wedded to the idea of peace for the establishment of an international court with compulsory jurisdiction, thus preparing the indispensable prerequisite for the achievement of any further progress.

The establishment of an international court with compulsory jurisdiction would, it is true, be a considerable limitation upon the so-called sovereignty of the states subjected to this jurisdiction. But experience teaches that states submit more easily to an international court than to an international government. Treaties of arbitration have proved up to now to be the most effective. Seldom has a

state refused to execute the decision of a court which it has recognized in a treaty. The idea of law, in spite of everything, seems still to be stronger than any other ideology of power.

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